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No. 96-___

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In The

Supreme Court of the United States

October Term, 1995

CITY OF ALBUQUERQUE, and TONI MARTORELLI, in her official capacity as Director of Family and Community Services for the City of Albuquerque, and MARK SANCHEZ, in his official capacity as Deputy Director of Family and Community Services for the City of Albuquerque, and KATHLEEN STARK, in her official capacity as Supervisor, Bear Canyon Senior Center, City of Albuquerque,

Petitioners,

versus

CHURCH ON THE ROCK and PASTOR DON KIMBRO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress has the power, consistent with this Court's view of the Establishment Clause, to condition its grants of federal funds under the Older Americans Act upon assurances by the States that "sectarian instruction" or "religious worship" will not be allowed in senior centers that are constructed or renovated with federal money?

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OPINIONS BELOW

The Court of Appeals issued its judgment on May 23, 1996, which is reported at 84 F.3d 1273, and is reproduced in the Appendix to this petition, Pet. App. 1a. The oral decision of the United States District Court for the District of New Mexico is reproduced in Pet. App. 17a, and the district court's order granting summary judgment in favor of the City, entered December 16, 1994, is reproduced in Pet. App. 15a.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit, reversing the United States District Court for the District of New Mexico, was issued on May 23, 1996. Pet. App. 1a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Because the constitutionality of 42 U.S.C. § 3027(a)(14)(A)(iv), has been drawn into question by the decision of the Tenth Circuit, and because the United States is not a party, 28 U.S.C. § 2403(a) may apply and a copy of this petition is being served on the Solicitor General of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which reads in relevant part as follows:

Amendment I:

> Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech. . . .

This case involves the constitutionality of 42 U.S.C. § 3027, which is set forth in its entirety in the Pet. App. 21a.

This case also involves Sections 1 and 5 of the Fourteenth Amendment, which read in relevant part as follows:

Amendment XIV:

> Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .
>
> Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

This case also involves questions under Congress' spending power pursuant to Article I, Section 8, Clause 1, which reads in relevant part as follows:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States. . . .

STATEMENT OF THE CASE

The Older Americans Act conditions federal grants under the Act upon recipient agencies giving assurances that senior citizen centers constructed or renovated with

federal funds are not used for sectarian instruction or religious worship. 42 U.S.C. § 3027(a)(14)(A)(iv) (1988). Pet. App. 30a-31a. It has never been disputed that this provision of the Act applies to the petitioners: City of Albuquerque (City) senior centers have received funding under the Act from the federal government, through the State of New Mexico Agency on Aging, for, among other purposes, renovation of City senior centers.

On February 11, 1994, Respondent Don Kimbro, then Minister of Discipleship for the Respondent Church on the Rock, a non-denominational evangelical church, requested that he be allowed to teach a 13-week class on the New Testament at a City senior center as part of the regular programming for seniors sponsored by the City. On March 24, 1994, Kimbro altered his request by asking to show a two-hour film entitled *Jesus* and to distribute large print Bibles to the center's "clientele".[1]

There has never been any dispute that the *Jesus* film constitutes the core religious activity of proselytizing.[2]

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[1] The requests were initially directed only to the Bear Canyon Senior Center; however, in proceedings before the district court, the challenge was later broadened to include all of the City's six senior centers.

[2] The respondents were forthright in admitting their purpose is religious proselytizing. The respondents candidly admitted that their aim in attempting to use the Bear Canyon Senior Center to show the *Jesus* film was "to share and spread the Gospel of Jesus Christ" and to thereby obtain religious converts. The *Jesus* film devotes primary attention to the miracles of Christ, especially in healing the sick. Episodes include the curing of the blind and lame, stopping a storm on the Sea of Galilee, relieving a madman of his demons, creating

Viewers are asked to adopt the religious beliefs espoused in the film and accept Christ as their savior. At the conclusion of the film, the following process of religious conversion is prescribed:

> [E]xperience His love and forgiveness and receive eternal life, you must receive Him as God's sacrifice for your sin and invite Him to come into your life by faith. If this is the desire of your heart, you can pray a prayer of faith and Jesus Christ will come into your life. This is a suggested prayer. I will say it first:
>
> > Lord, Jesus, I need you. Thank you for dying on the cross for my sins. I open the door of my life and receive you as my Savior and Lord. Take control of my life, make me the kind of person you want me to be. Amen.
>
> If this prayer expresses the desire of your heart pray this prayer right now where you are, pray after me silently as I repeat it one phrase at a time:
>
> > Lord, Jesus, I need you. –
> >
> > Thank you for dying on the cross for my sins. –
> >
> > I open the door of my life and receive you as my Savior and Lord. –

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food for the hungry, and curing an epileptic and a hunchback. The film also focuses on the crucifixion and resurrection of Christ in patently Christian terms, as the district court correctly found.

> Take control of life, make me the kind of person you want me to be. –
>
> Amen.

The last five minutes of the film have been transcribed, Pet. App. 67a, and the film itself has been lodged with the Court.

Pastor Kimbro's requests were denied by the petitioners on grounds the messages sought to be conveyed were "sectarian instruction" and "religious worship" in violation of the Older Americans Act and a City policy that is a verbatim reflection of that Act. Pet. App. 72a, ¶ 3. (The Church on the Rock had previously shown the film at another City-owned facility, which undisputably was a public forum, and was offered the opportunity to do so again at the same type forum; the Church declined that offer.)

The Church on the Rock and Pastor Kimbro brought suit under 42 U.S.C. § 1983. On December 16, 1994, the district court heard arguments on the Church's motion for a preliminary injunction. At the conclusion of the hearing, the Court converted the matter into one for summary judgment, and entered summary judgment for the City.[3]

The key findings of the district court pertinent to this petition were: that the purposes of senior centers were delineated by the Older Americans Act; that such purposes did not include sectarian instruction nor religious

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[3] The district court did not enter findings of fact nor conclusions of law, but rather issued its decision from the bench, which is attached hereto at Pet. App. 17a.

worship; that the *Jesus* film was "patently religious in nature and is intended to spread the word that Jesus is savior"; that the film's primary purpose was to proselytize; and, that the film was, therefore, sectarian instruction and could be properly excluded.

The Church on the Rock brought an appeal to the United States Court of Appeals for the Tenth Circuit, which on May 23, 1996, reversed the district court on grounds the City policy constituted viewpoint discrimination.

The Tenth Circuit rejected the City's reliance upon the Older Americans Act, holding that the statutory commands were an insufficient justification to exclude the Church on the Rock's speech. In doing so, the Court of Appeals has jeopardized federal funding under the Older Americans Act for the City and other government agencies with programs under the Act. This petition follows.

REASONS FOR GRANTING THE WRIT

Language almost precisely the same as at issue in the Older Americans Act has been found by this Court to be coextensive with the Establishment Clause. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 113 S. Ct. 2462, 2465 n.7 (1993). In *Tilton v. Richardson*, 403 U.S. 672 (1971) this Court upheld a condition placed on a Congressional grant employing the same language as in the Older Americans Act. Moreover, Congress uses the prohibition against sectarian instruction and religious worship in a host of grant statutes. *See Rosenberger v. University of*

Virginia, 515 U.S. ___, 115 S.Ct. 2510, 2544 n.9 (1995) (Souter, J., dissenting).

Against this background, the Tenth Circuit has boldly declared that Congress lacks the power to condition its appropriations upon state compliance with the Establishment Clause. This Court has never directly addressed the question of whether Congress possesses the power to enforce the Establishment Clause by conditioning its disbursal of federal funds, and should do so in this case.

This Court has held that incident to its power under the spending clause, Congress is permitted to attach conditions on the receipt of federal funds. *South Dakota v. Dole*, 483 U.S. 203 (1987). In *Rust v. Sullivan*, 500 U.S. 173 (1991) this Court, more specifically, upheld a federal funding program burdening speech against a viewpoint discrimination challenge. The Tenth Circuit's invalidation of Congress' funding restriction in the Older Americans Act is in conflict with these decisions.

By declaring that Congress may not attach such a condition upon its appropriations, and thereby enforce the Establishment Clause, the Tenth Circuit has also brought itself into conflict with the Fifth Circuit's holding in *Flores v. City of Boerne, Texas*, 73 F.3d 1352 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3017 (U.S. June 25, 1996) (No.95-2074), that Congress does have the power to enforce the Free Exercise Clause under Section 5 of the Fourteenth Amendment.

In short, this petition argues that the Tenth Circuit erred in viewing this case through the lens of this Court's public forum doctrine under the Free Speech Clause, and

should have properly analyzed it under the Establishment Clause, as the latter Clause has been implemented by Congress through the funding condition in the Older Americans Act.

I. THE DECISION OF THE COURT OF APPEALS RAISES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW AS TO THE POWER OF CONGRESS TO ENFORCE THE ESTABLISHMENT CLAUSE AS A CONDITION UPON THE EXPENDITURE OF FEDERAL FUNDS.

A. The Tenth Circuit's Decision Rejecting Application of The Older Americans Act Conflicts With This Court's Decision in *Tilton v. Richardson.*

Title III, § 307(a)(14)(A)(iv), of the Older Americans Act (42 U.S.C. § 3207(a)(14)(A)(iv) (1988)) provides that agencies that receive federal money for senior centers must assure the federal government that a senior center "will not be used and is not intended to be used for sectarian instruction or as a place for religious worship." Pet. App. at 30a-31a.

The Act creates a complex and detailed set of requirements for area agencies and state agencies to follow in order to qualify for and receive grants; the Act does not create a system incorporating an open-ended block grant program, giving the states free reign to implement senior programs. 42 U.S.C. §§ 3021-3030(r).[4]

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[4] The Older Americans Act is implemented through federal regulations at 45 C.F.R. §§ 1321.1-1321.83. The regulations provide, among other things: that each area agency only engage in activities which are consistent with its statutory mission (45

As this Court has recognized, the funding language of the Older Americans Act is a standard requirement not only of this Act but of a wide variety of federal grant statutes. *See Rosenberger v. University of Virginia*, 515 U.S. ___, 115 S.Ct. 2510, 2544 n. 9 (1995) (Souter, J., dissenting). The Tenth Circuit's decision has potentially cataclysmic consequences for the local and state programs that are funded under these statutes.

This Court has also recognized that this type of funding restriction by the federal government was designed to implement the Establishment Clause. In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 113 S.Ct. 2462, 2464 n.7 (1993), this Court indicated it was persuaded that regulatory language, similar to the Older Americans Act, was coextensive with the commands of the Establishment Clause.

In *Tilton v. Richardson*, 403 U.S. 672 (1971), this Court addressed the constitutionality of a Congressional grant progam with the same conditioning language as to sectarian instruction and religious worship. At issue was the Higher Education Facilities Act of 1963, which authorized grants for expansion of college facilities, but prohibited monies for "any facility used or to be used for sectarian instruction or as a place for religious worship. . . . "

C.F.R. § 1321.17(f)(1)); that each area agency create one or more visible "focal points" in the community where anyone can go to obtain help or information on any aging issue, and where possible these focal points will be senior centers (45 C.F.R. § 1321.53(c)); and that the area agency will insure that the maximum number of services are provided at the focal points. *Id.*

A plurality in *Tilton* agreed that the statute did not violate the religion clauses by authorizing grants to church-related colleges. However, in a portion of the decision of relevance to this petition, eight members of this Court agreed that the Establishment Clause was violated by the Act's provisions limiting the government's interest in covered facilities to a 20-year period, which thereby allowed use of the facilities for sectarian purposes after such period. This Court struck down that restriction because it was "inadequate to ensure that the impact of the federal aid will not advance religion." 403 U.S. at 682.

As the legislative history examined in *Tilton* makes clear, the prohibition on "sectarian instruction" and "religious worship" in federally-funded facilities reflected an attempt by Congress to acknowledge the neutrality principles that have reached full flower in this Court's Establishment Clause jurisprudence. In debates before the Senate on the Higher Education Facilities Act of 1963, Senator Sam Ervin pressed amendments that would have removed from eligibility grants for colleges that were owned or controlled by religious denominations. 109 Cong. Rec. 19492 (1963). That attempt failed. The language that is reflected in the Older Americans Act, and elsewhere in federal grant programs, prevailed as a Congressional compromise to allow federal funds to help construct facilities on a neutral basis so long as core religious activities were not promoted in the process. The Tenth Circuit has now jeopardized this long-standing accommodation.

The Tenth Circuit distinguished *Tilton* on the theory that limitations on sectarian instruction and religious

worship in senior centers are subject to challenge on free speech grounds. *Church on the Rock*, 84 F.3d at 1281. That, however, begs the question of whether Congress can legitimately prohibit what are in this case, undisputably, core religious activities, such as Christian evangelism and proselytizing, when they are presented in federally-funded facilities in the context of senior center programs that are permeated with government regulations and control.[5]

However, the nature of the forum is not, and should not be, the issue. The issue is the power of Congress to enforce the Establishment Clause through its funding statutes. This Court has repeatedly upheld the constitutionality of funding statutes that aided religious institutions, so long as there were assurances that core religious activities were not being furthered. Thus, this Court has continued to read *Tilton* as allowing examination of a government grant program to determine whether "particular applications" of a program result in government sponsorship of sectarian practices. *Bowen v. Kendrick*, 487 U.S. 589, 601-602 (1988). *See also Hunt v. McNair*, 413 U.S. 734 (1973).

The "particular application" in this case is clear and undisputed. In fact, the Church on the Rock proudly agrees that what it is proposing is sectarian instruction and proselytizing. The question then is simple, and need not be burdened with forum analysis: Does Congress

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[5] *Widmar v. Vincent*, 454 U.S. 263 (1981), relied upon by the Tenth Circuit in distinguishing *Tilton*, did not involve an attempt, as here, to insert core religious activities into the heart of a federally regulated and funded program.

have the power to enforce the Establishment Clause to restrict core religious activities at federally-funded facilities?

B. The Older Americans Act Prohibition on Sectarian Activity is Appropriate Legislation Designed by Congress to Implement the Establishment Clause Through Its Enforcement Powers Under Section 5 of the Fourteenth Amendment.

Section 5 of the Fourteenth Amendment states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. Amend XIV, § 5. The issue of whether Congress' power under Section 5 of the Fourteenth Amendment is the same when it acts to enforce an incorporated right as when it acts to remedy a violation of the Fourteenth Amendment has not been expressly decided by this Court. *See Hutto v. Finney*, 437 U.S. 678, 718 (1978) (Rehnquist, J., dissenting).

This Court has expressed that Congress' Section 5 powers were included to confer "the same broad powers expressed in the Necessary and Proper Clause." *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966). Thus, in the recent words of Judge Posner, the enforcement clause empowers Congress to act to give "practical efficacy" to a constitutional right. *Sasnett v. Sullivan*, ___ F.3d ___, 1996 W.L. 432348 (7th Cir. 1996). In upholding RFRA in *Flores* the Fifth Circuit concluded: "Section 5 does not place conditions on Congress' authority to enforce the amendment. Congress has the power to enforce 'the provisions of this article,' not just the Equal Protection Clause." 73

F.3d at 1358 (citing *United States v. Price*, 383 U.S. 787, 789 (1966)).

The question for this Court must be whether Congress' enforcement of the Establishment Clause in the funding provision of the Older Americans Act is valid under the three-part test announced in *Morgan*, 384 U.S. at 650, an inquiry that this Court has fashioned to assure that Congressional acts are consonant with the principles of legislative power announced in *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

The first inquiry under *Morgan* is whether the funding restriction "may be regarded" as an enactment to enforce the Fourteenth Amendment. This Court has seen fit to incorporate the liberty interests protected by the First Amendment into the fundamental concept of liberty embodied in the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Establishment Clause was specifically incorporated in *Everson v. Board of Education*, 330 U.S. 1 (1947).

Based upon the legislative history outlined in *Tilton*, for the same Congressional language, there can be little doubt that Congress enacted the funding restrictions in the Older Americans Act in order to enforce the Establishment Clause violations that it saw lurking in unfettered grants for construction or renovation of senior centers. *See* 109 Cong. Rec. 14962 (1963) (comments of Rep. Quie).

Incorporation of First Amendment guarantees into the Fourteenth Amendment has resulted in a flood of religion cases that, arguably, this Court should not have been required to address. It is only reasonable, therefore,

that Congress ought to have some role, in this area of constitutional uncertainty.

Thus, under the second prong of the *Morgan* test, funding restrictions under the Older Americans Act are also "plainly adapted" to what Congress perceived as its role in ensuring proper application of funds it has appropriated. *Morgan*, 384 U.S. at 652. This Court has recognized only one restriction on the power of Congress to tax and spend, and that restriction is the Establishment Clause. *Flast v. Cohen*, 392 U.S. 83, 105 (1968). Given this limitation, it is only reasonable that Congress have attached conditions upon monies spent by it so as to prevent violations of the Establishment Clause.

When it enacted the funding condition in the Older Americans Act in 1978, Congress clearly had fresh in its mind the very debate that had generated the language in the Higher Education Facilities Act of 1963 that was enforced in *Tilton*. The Senate debate on that Act demonstrates that in rejecting the absolutist approach of Senator Ervin, in favor of a narrow ban on "sectarian instruction" and "religious worship", Congress was guided by neutrality principles underlying this Court's opinion in, for example, *Everson v. Board of Education*, 330 U.S. 1, 17 (1947) ("[W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as part of a general program under which it pays the fares of pupils attending public and other schools."). *See* 109 Cong. Rec. 19494 (Remarks of Sen. Ribicoff) ("Without a doubt, we in Congress are striving to achieve a secular purpose when we seek to improve the educational opportunities for our

nation's colleges. . . . Aid for the religious aspects of church related colleges has been specifically excluded").

This neutrality principle now informs the Court's increasing reliance upon an endorsement standard for adjudicating cases under the Establishment Clause. As will be demonstrated below in Section II, the funding restriction of the Older Americans Act is entirely consistent with this Court's current views. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 50-52 (1985) (O'Connor, J., concurring).

The third inquiry under *Morgan* is whether the funding restriction is consistent "with the letter and spirit of the constitution." Under *Morgan*, Section 5 does not grant Congress power to enact statutes that dilute the guarantees of the Fourteenth Amendment. *Morgan*, 384 U.S. at 651 n.10.

The funding restriction of the Older Americans Act burdens the exercise of free speech, but not in an impermissible manner. This Court has recognized that government serves a compelling interest in enforcing the Establishment Clause, and may thereby sometimes burden free speech. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). *See also Meese v. Keene*, 481 U.S. 465 (1987) (foreign film may be barred as "political propaganda" under Foreign Agents Registration Act even though such action restricts free speech); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) (I.R.S. statute granting tax exemption for non-profit organizations that do not engage in substantial lobbying activities not a violation of the First Amendment).

In implementing the Establishment Clause in the Older Americans Act, Congress has not overturned this Court's precedent as done by Congress in RFRA. The Older Americans Act does not tread upon this Court's long-recognized principle that "neutral laws of general applicability", with incidental religious benefits, should be protected from attack under the Establishment Clause.

Rather, under the Older Americans Act, again using the legislative history explicated in *Tilton*, Congress has seen fit to create a neutral funding program of general application, but has stated its limits as to core religious activities in a manner that is consistent with this Court's Establishment Clause precedents. By analogy, this is precisely the result allowed by this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990).

In *Smith*, this Court held that a generally applicable, neutral criminal law that has the effect of burdening religious practices under the Free Exercise Clause need not be justified by a compelling governmental interest. By the same token, there is no question that Congress' funding restriction under the Older Americans Act burdens the exercise of free speech. Therefore, there is no reason to judge the Older Americans Act by any higher standard than this Court used to judge the act of the Oregon legislature in *Smith*. This Court also was clear in *Smith* that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." 494 U.S. at 878-879. This Court gave proselytizing as an example of the religious conduct that the government may regulate. 494 U.S. at 877.

Congress' enforcement of the Establishment Clause through the grant condition of the Older Americans Act is, therefore, a necessary and proper exercise of its Section 5 power.

C. The Older Americans Act Prohibition on Sectarian Activity is A Valid Condition Upon the Grant of Federal Funds Under Congress' Spending Power.

The Tenth Circuit in this case has prohibited the application of a federal statute that places conditions upon the expenditure of federal funds. As such, the Tenth Circuit's decision must withstand scrutiny under this Court's recent pronouncements in *South Dakota v. Dole*, 483 U.S. 203 (1987), and *Rust v. Sullivan*, 500 U.S. 173 (1991).

In *Dole*, this Court sustained a federal statute allowing Congress to withhold a percentage of federal highway funds to states allowing persons under age 21 to purchase or possess alcohol since Congress was acting indirectly under its spending power even though it may not directly regulate the drinking age. Such action is permissible, this Court stated, so long as Congress acts (1) in pursuit of "the general welfare"; (2) unambiguously and in such a fashion to enable the states to exercise their choice knowingly; (3) so that the conditions on federal grants are related to the particular program; and (4) so that the condition does not violate an independent constitutional barrier.

In the present case there can be no doubt that conditional funding under the Older Americans Act is in pursuance of the general welfare and is clearly related to the federal program of providing services to elderly Americans through a facility that is designed to be a focal point for their needs. The legislative history at the time Congress inserted the grant condition into the Older Americans Act (P.L. 95-478 (1978)) makes clear that Congress was creating senior centers as focal points for the provision of services under the Act and had the general welfare of the elderly in mind. 124 Cong. Rec. 33483 (Rep. Green); 33486-87 (Rep. Pepper); 33488 (Rep. Wampler); 33491 (Rep. Bonker); 34421 (Sen. Chafee); 13600 (Rep. Hammerschmidt); 22369 (Sen. Chafee); and 22410 (Sen. Biden) (1978). Moreover, the condition itself is directly related to the appropriate Congressional goal of limiting use of senior centers to the purposes legislatively defined. *See* 42 U.S.C. § 3002(35); 45 C.F.R. § 1321.17(f)(1).

The independent constitutional bar relied upon by the Tenth Circuit is the Free Speech Clause. However, in *Rust* this Court rejected the viewpoint discrimination argument lodged against a federal regulation that restricted discussion of abortion under a federal statute setting up grants for family planning. This Court stated: "Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." 500 U.S. at 194. This Court, thus, determined that the funding restriction was "designed to ensure that the limits of the federal program are observed" and to restrict "activities outside the project's scope". 500 U.S. at 193-194.

This Court further stated:

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.

500 U.S. at 194.

Clearly, no less can be said of Congress' implementation of the Establishment Clause. The petitioners are not required to open senior centers for uses beyond those for which they are lawfully dedicated. *U.S. Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114 (1981). In addition, the petitioners offered the Church on the Rock alternate forums for their speech. As recognized in *Dole*, the petitioners were not forcing the Church on the Rock to give up their religious speech; they merely were requiring that the Church "keep such activities separate and distinct from [Older Americans Act] activities." 500 U.S. at 196.

In short, the Tenth Circuit's decision cannot withstand scrutiny under this Court's conditional funding cases, and should be reversed.

II. CONGRESS MAY PROHIBIT CORE RELIGIOUS ACTIVITIES IN FEDERALLY-FUNDED SENIOR CENTERS CONSISTENT WITH THIS COURT'S CURRENT VIEW OF THE ESTABLISHMENT AND FREE SPEECH CLAUSES.

This Section of the petition argues that within the context of federally-funded and City-administered senior center programs, the practice of patent sectarian proselytizing and worship would be perceived by the reasonable observer as carrying government support and endorsement. Consequently, the funding restriction in the Older Americans Act, as it is administered by the City, is entirely consistent with this Court's present view of the limits of the Establishment Clause.

"Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring). The Tenth Circuit has defaulted in not analyzing this case as involving a violation of the Establishment Clause, which is within Congress' prerogative to enforce.

This Court has increasingly hinged its Establishment Clause analysis upon the degree and extent of government support and endorsement of religious speech. Thus, in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 600 n.50 (1989), the central focus of this Court's endorsement analysis was that the Grand Staircase was not a place "in which all were free to place their displays" and that the presence of a creche there under those circumstances served to associate the government with the display.

In the case of senior centers, petitioners have never permitted sectarian proselytizing or worship. Allowance of non-sectarian, non-proselytizing educational classes on Tai Chi, meditation, counseling or metaphysics does not amount to an "open door" sufficient to negate the impression of government endorsement. This is especially true where the facts reflect that the Church on the Rock attempted to first insinuate itself into the very senior center programs to conduct a 13-week class on the New Testament, and, then, to show its *Jesus* film. At no time did the Church ever indicate that it wanted to exhibit the film outside the regular senior center hours or programs, which are all approved, sponsored and produced by the City after being advertised in City-published catalogs. Neither did the Church ever indicate that it wanted to show the film to anyone other than senior center program participants. There was no dispute that Church on the Rock was an "outside" organization with no ties to the senior centers, although Pastor Kimbro did join the Bear Canyon Senior Center *after* his lawsuit was filed. The Church never requested use of senior center space for after-hours meetings for itself as an "outside" group.

Each City senior center publishes an Activities Catalog and Calendar of events. In the normal course, the Church's proposed class or film would be placed in the Catalogs and Calendars as part of the City center program. The City Catalog welcomes seniors to the centers and, for example, states at the top of the first page "Bear Canyon Senior Center is operated by the City of Albuquerque, Department of Community Services, Office of Senior Affairs." Each catalog identifies all the programs

as "City" programs and lists all of the services the City provides.

The City has never allowed unrestricted access to senior centers by outside groups or organizations, and enforces a variety of general restrictions on use in addition to the funding guidelines of the Older Americans Act.[6]

These facts remove this case from the "after-hours", religion-neutral, open forum situations that were evident in *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) ("the forum is available to a broad class of nonreligious as well as religious speakers; there are over 100 recognized student groups at UMKC"); *Lamb's Chapel v. Center Moriches Union Free School*, 508 U.S. 384, 113 S.Ct. 2141, 2147 (1993) ("The showing of this film would not have been during school hours, would not have been sponsored by the school, and

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[6] Only seniors who become members of the centers can participate in City programs. The City designs the senior programs it offers, and receives input from advisory councils comprised of seniors who are members of the centers as required by the Older Americans Act. The only allowed non-program uses of City senior centers are for after-hours use of meeting rooms for senior support groups whose membership is at least 75% seniors 55 years old or older to discuss only senior issues, and, on occasion, City policymakers. Examples of groups are the American Association of Retired Persons, a Recreational Vehicle Club and Alzheimers Support Group. The Centers are staffed at all times by city employees who operate programs including meal services, frail elderly day care services, recreation services and health services. No for-profit businesses are allowed to use the facilities except for limited senior-related advertising on bulletin boards. The City does not allow political speeches by single candidates and restricts the distribution of campaign literature. Pet. App. 74a-75a.

would have been open to the public, not just to church members."), *Rosenberger v. University of Virginia*, 515 U.S. ___, ___, 115 S.Ct. 2510, 2522, 2524 (1995) ("The object of the SAF is to open a forum for speech and to support various student enterprises"; "the student publication is not a religious institution . . . and it is not a religious organization as used in the University's own regulations"), and in *Capital Square Review Board v. Pinette*, 515 U.S. ___, 115 S.Ct. 2440, 2448 (1995) ("Capital Square is a genuinely public forum, and has been widely used as a public forum for many, many years"), facts all of which persuaded this Court that the speech in those cases was not being endorsed by the government. In this case, a reasonable observer would believe that a proselytizing message inserted so directly into senior center programming was being endorsed and sponsored by the City.

As the basis for its conclusion that the Church on the Rock's message was "sectarian instruction", the district court, found that the *Jesus* film was "patently religious in nature and is intended to spread the word that Jesus is the savior" and that "the film's primary purpose is to proselytize". In doing so, the district court determined that conduct which violated the Establishment Clause was not within the legislatively defined purposes of senior centers and could be validly excluded.

The film *Jesus* is a two-hour depiction of the life of Jesus, which Pastor Kimbro characterized as "based on the Gospel of Luke from the Bible." This is, by admission, a Christian evangelical film. It is not about family values or child-rearing, albeit with a religious slant, as was the case in *Lamb's Chapel*. (The description of the film series

in *Lamb's Chapel* contained only one reference to "a loving God." 113 S.Ct. at 2145 n.3.)

Senior centers are not places where the City has previously allowed in a "wide array of non-religious, anti-religious and competing religious viewpoints" – let alone blatant proselytizing – so as to obviate the image of government endorsement. *Rosenberger,* 115 S.Ct. at 2527 (O'Connor, J., concurring). The district court found that the City had never previously allowed core religious speech at any of its senior centers. Thus, there is nothing in this case that would indicate a "long-standing practice" that would dissuade the reasonable observer that the Church on the Rock's message was being endorsed by the City; there are no indicators to counter the obvious fact that the government is making an exception to accommodate a patently Christian message in a place that has never allowed such messages before.

Thus, *Tilton* retains its full force in this case. This was not an "open-forum" case that would bring it within the *Widmar* exception. The Tenth Circuit, in its *de novo* review of the grant of summary judgment in this case, failed to recognize the overwhelming evidence that this case was, first and last, one that must be analyzed under the federal statute as embodying the Establishment Clause.

The Tenth Circuit's attempt to portray this case as a violation of free speech and as viewpoint discrimination collapses under the sheer weight of the Establishment Clause violation. Under this Court's limited public forum analysis, property remains a nonpublic forum as to all unspecified uses, *Cornelius v. NAACP Legal Defense &*

Educ. Fund, 473 U.S. 788, 802 (1985); *Perry Education Association v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983), and exclusion of uses, even if based upon subject matter of the speaker's identity, need only be reasonable and viewpoint-neutral. *See Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987).

This Court's opinion in *Rosenberger* does not change this analysis as it relates to the enforceability of the Older Americans Act. The regulation of speech in *Rosenberger* barred all "religious activity" that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." 115 S.Ct. at 2515. It was the breadth of this regulation that persuaded this Court that it was an unconstitutional suppression of free speech. 115 S.Ct. at 2515-2520.

The regulation in *Rosenberger*, however, was considerably broader than the Older Americans Act, which narrowly captures "sectarian instruction" and "religious worship". Pursuant to that statute, petitioners have never allowed into its senior centers sectarian instruction, or, to be more exact, Christian proselytizing, and the district court so held. Therefore, the Tenth Circuit has misapplied this Court's precedent in believing that forum analysis controlled an obvious violation of the Establishment Clause that the City appropriately regulated through a constitutional federal statute.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully Submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CHURCH ON THE ROCK; DON KIMBRO, Pastor, Plaintiffs-Appellants, v. CITY OF ALBUQUERQUE; TONI MARTORELLI, in her official capacity as Director of Family and Community Services for the City of Albuquerque; MARK SANCHEZ, in his official capacity as Deputy Director of Family and Community Services for the City of Albuquerque; KATHLEEN STARK, in her official capacity as Supervisor, Bear Canyon Senior Center, City of Albuquerque, Defendants-Appellees.	)	No. 95-2009

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D. C. No. 94-CV-1101)

Benjamin W. Bull, The American Center for Law and Justice, Phoenix, Arizona (Jay Alan Sekulow, The American Center for Law and Justice, Washington, DC, Nikolas T. Nikas, The American Center for Law and Justice, Phoenix, Arizona, and Paul F. Becht, Becht Law Firm, Albuquerque, NM, with him on the briefs) for the Appellants.

William D. Winter, Assistant City Attorney (Robert M. White, City Attorney, with him on the brief) Albuquerque, NM, for the Appellees.

Before TACHA, LOGAN, and REAVLEY,* Circuit Judges.

TACHA, Circuit Judge.

Plaintiffs Church on the Rock and Pastor Don Kimbro ("Church on the Rock") brought suit under 42 U.S.C. § 1983 alleging that defendants the City of Albuquerque and its agents ("the City") denied Church on the Rock's First Amendment right to free expression at City Senior Centers. The district court granted summary judgment in favor of the City on all claims. Church on the Rock now appeals, arguing that the City's policy prohibiting "sectarian instruction and religious worship" at City Senior Centers violates the First Amendment. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and reverse.

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* The Honorable Thomas M. Reavley, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

I. Background

The City owns and operates six Senior Centers. The centers are multipurpose facilities that provide forums for lectures, classes, movies, crafts, bingo, dancing, physical exercise, and other activities. To become a member of a Senior Center, one need only fill out an application. The sole requirement for membership is that a person be at least fifty-five years old or be married to a member who is at least fifty-five years old. People who use the Senior Centers do not reside there, and all of the programs are voluntary.

Many of the programs at the Senior Centers are organized and sponsored by private individuals or organizations. Senior center policies permit non-member groups to use the centers for classes and other activities if the subject matter is "of interest to senior citizens." Alternatively, groups may use the Senior Centers without regard to this subject matter requirement if they are composed of seventy-five percent or more senior citizens. Nonmembers or persons under fifty-five years of age may conduct classes, and people who deliver lectures or teach classes are also permitted to distribute literature.

The range of subjects that qualify as being "of interest to senior citizens" is quite broad. The Senior Centers' activities catalogs list many of the programs that meet this requirement, such as Amateur Radio, Ceramics, Chinese, Choral Group, Economics, El Abuelo – The Clown of Spanish Culture, Fishing, Medicare/Health Insurance Counseling, Myth of the Hanging Tree, and Plants and People of New Mexico. The catalogs also include a number of classes and presentations in which religion or

religious matters are the primary focus: Bible as Literature, Myths and Stories About the Millennium, Theosophy, and A Passover Commemoration (an oratorio). The catalogs encourage "ideas for new classes and programs" as well.

On March 24, 1994, Pastor Kimbro, a citizen over the age of fifty-five, requested permission from Kathleen Stark, the supervisor of the Bear Canyon Senior Center, to show a two-hour film entitled *Jesus*. The film recounts the life of Jesus Christ as described in the Gospel of Luke. At the conclusion of the story, a voice-over narrator makes affirming statements such as, "Jesus is exactly who he claimed to be – the Son of the Lord, the Savior of all mankind." The narrator then invites viewers to adopt the Christian religion and to join him in a short prayer. Kimbro also requested permission to give away giant-print New Testaments to persons attending the film.

On May 18, 1994, after reviewing the film, Mark Sanchez, the City's Deputy Director of Family and Community Services, denied Kimbro's requests. Sanchez stated that City policy prohibited the use of Senior Centers "for sectarian instruction or as a place for religious worship." The City adopted this policy to conform with the terms of the Older Americans Act. The Older Americans Act provides federal funding to the states for multipurpose senior centers, but requires, as a condition for receiving such funding, that the "facility will not be used and is not intended to be used for sectarian instruction or as a place for religious worship." 42 U.S.C.A. § 3027(a)(14)(A)(iv).

In keeping with this directive, Senior Center personnel screen programs for sectarian instruction or religious worship before allowing them at the Senior Centers. Senior Center employees also monitor presentations for religious content by sitting in on classes and entertaining objections from Senior Center members who call attention to expression falling into one of these forbidden categories. When Senior Center employees determine that presentations are too religious in nature, they intervene to stop the presentations. There are no official criteria or written standards to assist them in deciding whether or not expression constitutes "sectarian instruction" or "religious worship."

Church on the Rock filed this suit seeking declaratory and injunctive relief. The district court granted summary judgment in favor of the City. In its decision, the court assumed without deciding that the Senior Center is a designated limited public forum. The court stated that the purpose of the Senior Center does not include sectarian instruction, and that the primary purpose of the film *Jesus* is to proselytize. The court concluded that the film constitutes sectarian instruction and that the City may therefore exclude the film on the ground that its subject matter is not within the purpose of the Senior Centers. The court also held that the City's restriction is not viewpoint-based because the City does not permit sectarian instruction from *any* religious perspective. This appeal followed.

II. The Degree of First Amendment Protection Afforded to the Expression

We review the district court's grant of summary judgment de novo. *Cannon v. City and County of Denver*, 998 F.2d 867, 870 (10th Cir. 1993). We begin our analysis by noting that the speech in question is entitled to First Amendment protection. It is well established that religious worship and discussion are forms of speech and association protected by the First Amendment. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981); *Heffron v. International Soc. for Krishna Consciousness*, 452 U.S. 640, 647 (1981). The City argues that the proselytizing religious speech in the film *Jesus* enjoys a lesser degree of First Amendment protection than does religious speech that is not intended to recruit new believers. The Supreme Court, however, has rejected the notion that speech about religion, religious speech designed to win converts, and religious worship by persons already converted should be treated differently under the First Amendment. *Widmar*, 454 U.S. at 269 n. 6; *see also Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2148 (1993) (describing the fear that proselytizing by a "radical" church might cause unrest as "difficult to defend as a reason to deny the presentation of a religious point of view about a subject the District otherwise makes open to discussion on District property"). The City's policy, then, restricts speech that is entitled full protection under the First Amendment.

III. The Nature of the Forum

The government's ability to restrict protected speech by private persons on government property depends, in part, on the nature of the forum. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797 (1985). The three types of forums that may exist on government property are traditional public forums, designated public forums, and nonpublic forums. *Id.* at 802. Traditional public forums are places such as streets and parks that "by long tradition . . . have been devoted to assembly and debate." *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). Designated public forums are those "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802. Thus, designated public forums may be limited in terms of participants and in terms of subject matter. University facilities opened for meetings of registered student organizations qualify as a designated public forum, *Widmar*, 454 U.S. at 267-68, as do public school classrooms that are available to the general public outside of school hours for limited purposes, *Lamb's Chapel*, 113 S. Ct. 2141, 2146-47. In *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995), the Supreme Court treated a university's student activities fund as a designated public forum, albeit "more in a metaphysical than in a spatial or geographic sense." *Id.* at 2517. A nonpublic forum is government property that is not by tradition or designation a forum for public communication. *Perry*, 460 U.S. at 46.

The Bear Canyon Senior Center is a designated public forum. It may not be classified as a traditional public

forum because it is not a traditional location of public debate or assembly. It is, however, a place that has been opened to the public for discussive purposes. The City has permitted lectures and classes on a broad range of subjects by both members and non-members at its Senior Centers. The City limits this designated public forum in two ways. First, the City imposes an age requirement for participation, although this limitation is rather flexible where groups or spouses are involved. Second, the City limits the subject matter of presentations to topics "of interest to senior citizens." The subject matter limitation has also been extremely flexible in practice, as evidenced by the long list of diverse topics that have been presented in the past.

IV. The Nature of the City's Restriction

Having classified the type of forum involved, we now turn to the type of restriction that the City has imposed. The Senior Center Policies and Procedures Manual from the City's Office of Senior Affairs includes the following directive: "It is prohibited to use any OSA facility for sectarian instruction or as a place for religious worship." The City contends that this policy is a restriction based upon content, not viewpoint, because it disallows all sectarian instruction and religious worship in its Senior Centers, regardless of the particular religion involved. The Supreme Court, however, has rejected similar arguments. In *Lamb's Chapel*, for example, the Court noted that the mere fact that a regulation categorically treats all religions alike does not answer the critical question of whether viewpoint discrimination exists between religious and nonreligious expression. 113 S. Ct. at 2147.

Here, the City had already opened the doors of its Senior Centers to presentations about religion, such as The Bible as Literature and Myths and Stories About the Millennium. The City allowed speakers at Senior Centers to discuss the Bible from a "strictly historical" perspective and to address religion as long as such presentations could be characterized as "a literature discussion or a philosophical discussion." The film *Jesus* dealt with subject matter similar to that which would be included in a class on the Bible as literature. The film ran afoul of City policy, however, by advocating the adoption of the Christian faith. In contrast, a film about Jesus's life that ended on a skeptical note and urged agnosticism or atheism would not have contravened the City's policy. Because "[t]he prohibited perspective, not the general subject matter" triggered the decision to bar the private expression, *Rosenberger*, 115 S. Ct. at 2517, the City's policy is properly analyzed as a viewpoint-based restriction on speech.

Moreover, even if the City had not previously opened the Senior Centers to presentations on religious subjects, its policy would still amount to viewpoint discrimination. Any prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint. Instruction becomes "sectarian" when it manifests a preference for a set of religious beliefs. Because there is no nonreligious sectarian instruction (and indeed the concept is a contradiction in terms), a restriction prohibiting sectarian instruction intrinsically favors secularism at the expense of religion. Therefore, we conclude that the City's policy constitutes viewpoint discrimination.

V. The Appropriate Level of Judicial Scrutiny

The government bears a particularly heavy burden in justifying viewpoint-based restrictions in designated public forums. Viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger,* 115 S. Ct. at 2516. Content-based restrictions are subject to strict scrutiny. *See United States v. Kokinda,* 497 U.S. 720, 726-27 (1990); *Perry,* 460 U.S. at 46. Viewpoint-based restrictions receive even more critical judicial treatment. As the Supreme Court noted in *Rosenberger:*

> The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. . . . [I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

115 S. Ct. at 2516-2517 (citations omitted). While the Court did not explain what, precisely, the government must show in order to overcome this heavy presumption, it did indicate that the necessity of complying with another clause of the Constitution – the Establishment Clause – would excuse a viewpoint-based restriction on speech. *Id.* at 2520. We understand *Rosenberger* to mean that courts must examine viewpoint-based restrictions with an especially critical review of the government's

asserted justifications for those restrictions. At a minimum, to survive strict scrutiny the City's policy must be "narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S. at 46.

VI. The City's Justifications for its Policy

The City offers three justifications for its policy prohibiting religious expression. First, the City asserts that the policy ensures conformity with the First Amendment's prohibition against state establishment of religion. While adherence to the Establishment Clause is a compelling government interest that may justify restrictions on speech in designated public forums, *Rosenberger*, 115 S. Ct. at 2520; *Widmar*, 454 U.S. at 270-71, the City's restriction is not necessary to serve this interest. The Supreme Court has made it abundantly clear that providing equal access to a designated public forum for citizens engaging in religious expression and citizens engaging in secular expression does not violate the Establishment Clause. *Rosenberger*, 115 S. Ct. at 2520-25; *Lamb's Chapel*, 113 S. Ct. at 2148; *Widmar*, 454 U.S. at 270-75. The government need only remain neutral, preferring neither religious nor secular expression over the other. *See Rosenberger*, 115 S. Ct. at 2521-2522. Where the state does not sponsor the religious expression, the expression is made on government property that has been opened to the public for speech purposes, and permission is obtained through the same application process and on the same terms as secular groups, there is no violation of the Establishment Clause. *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2447 (1995). "[I]t is no violation for government to enact neutral policies that happen to benefit religion." *Id.*

Clearly, the Establishment Clause does not compel the City to bar sectarian instruction and religious worship from its Senior Centers.

Second, the City asserts that its policy is necessary to remain in compliance with the Older Americans Act. To that end, the policy mirrors the language of the Older Americans Act, which requires as a condition for receiving federal funding assurances that a "facility will not be used and is not intended to be used for sectarian instruction or as a place for religious worship," 42 U.S.C. § 3027(a)(14)(A)(iv). The fact that the City's policy is designed to conform with federal statutory requirements, however, does not shelter it from constitutional scrutiny. A city or state's desire for federal funds is not a compelling government interest. Thus, compliance with the Older Americans Act does not justify this viewpoint-based restriction on expression. In the context presented here, no government entity may permissibly control the viewpoint being expressed. See *Rosenberger*, 115 S. Ct. at 2518-19 (where the government expends public funds to convey its own message, it may say what it wishes; where private speech is concerned, the government may not restrict expression on the basis of viewpoint).

Third, the City asserts that its policy is necessary to protect the senior citizens who use its centers. The City argues that the senior citizens who use the Senior Centers are members of a "captive audience" who are "vulnerable" to "religious proselytizing and coercion." Br. Appellees 27. This claim is at best tenuous, and at worst insulting to senior citizens. People in this age group are not in need of special insulation from invitations to adopt a religious faith; nor are they, as a class, more likely than

other citizens to be intimidated by such invitations. Moreover, the showing of the *Jesus* film and the distribution of giant-print New Testaments can hardly be construed as intimidating or coercive. People who choose to attend presentations at the Senior Centers do not become part of a captive audience: attendance at such programs is purely voluntary, and people are free to come and go as they please. Nor is there any implicit coercion to attend. This is not a situation akin to the school graduation ceremony at issue in *Lee v. Weisman*, where those who chose to absent themselves paid the price of missing "one of life's most significant occasions." 112 S. Ct. 2649, 2659 (1992). Shielding senior citizens from religious speech, then, is also an inadequate justification for the City's policy.

VII. *Tilton v. Richardson*

Finally, we address the City's contention that *Tilton v. Richardson*, 403 U.S. 672 (1971), which primarily concerned an Establishment Clause challenge to statutory language similar to that in the Older Americans Act, should be read to uphold the City's policy against a free speech challenge. We reject this reading of *Tilton*. In that case, the Court considered a federal grant and loan program for the construction of academic facilities at institutions of higher learning. The terms of the act excluded facilities used for sectarian instruction or religious worship. The Court held, however, that a provision in the act that effectively allowed facilities to be converted entirely to religious purposes after twenty years violated the Establishment Clause. *Id.* at 682-684. At no point did the Court address any free-speech challenge to the act, and

nothing in the opinion implied that its decision upholding the remainder of the act against an Establishment Clause challenge could be extended to protect similar statutory language against a free-speech challenge. Furthermore, the Court revisited the *Tilton* case in *Widmar* and warned against such an expansive reading: "[N]othing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others." 454 U.S. at 272 n. 12.

VIII. Conclusion

The City of Albuquerque has failed to show a compelling interest that justifies its policy prohibiting sectarian instruction and religious worship at its Senior Centers. For that reason, we hold that the policy is an unconstitutional restriction on expression. We therefore REVERSE the judgment of the district court and enjoin the City from barring the showing of the film *Jesus* and the distribution of New Testaments at its Senior Centers. We also award reasonable attorney's fees to the appellants in the district court and on appeal, as provided under 42 U.S.C. § 1988, and remand this matter to the district court for the determination of appropriate fee amounts.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

CHURCH ON THE ROCK and
PASTOR DON KIMBRO,

Plaintiffs,

vs. CIV 94-1101 JC/WWD

CITY OF ALBUQUERQUE, TONI MARTORELLI, in her official capacity as Director of Family and Community Services for the City of Albuquerque, and MARK SANCHEZ, in his official capacity as Deputy Director of Family and Community Services for the City of Albuquerque, and KATHLEEN STARK, in her official capacity as Supervisor, Bear Canyon Senior Center, City of Albuquerque,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER came on for consideration of the Plaintiff's Notice of Motion for Preliminary Injunction, filed October 3, 1994. The Court received evidence and testimony and heard the arguments of counsel on December 5, 1994 and again on this date. Having announced my reasoning and the ruling from the bench and the parties agreeing to converting the motion to one for Summary Judgment, the Court enters judgment.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Summary Judgment is hereby entered for the Defendants on the Complaint.

Dated December 16, 1994.

/s/ John E. Conway
CHIEF UNITED STATES
DISTRICT JUDGE

Date of Entry 12-16-94

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

HONR. JOHN E. CONWAY, JUDGE PRESIDING

CHURCH ON THE ROCK and PASTOR DON KIMBRO,	)	
Plaintiffs,	)	No. CIV 94-1101-JC
vs.	)	
CITY OF ALBUQUERQUE, et al.,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
VOLUME II
December 16, 1994

APPEARANCES

FOR THE PLAINTIFF:

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BY: MR. WILLIAM D. WINTER

* * *

[p. 100] thing as the Establishment Clause, because in this context, that's the only way those words can pass constitutional muster is if they're interpreted or defined to mean the Establishment Clause. Because if they mean anything else, then they're on a collision course with *Lamb's Chapel*, which I believe is controlling in this particular case.

Your Honor, unless the Court has any more questions for me, that's all I have.

THE COURT: All right. Appreciate the arguments this morning, I'll give you a decision at 11:30.

MR. BULL: 11:30?

THE COURT: Yes.

(Recess held.)

THE COURT: All right. This is my decision in the case of *Church on the Rock and Pastor Don Kimbro v. City of Albuquerque et al.*

First, I find the plaintiffs have failed to show a likelihood of success on the merits. To reach this decision, I do not need to decide whether the senior center should be characterized as a designated limited purpose public forum or a nonpublic forum. Even if the senior center is a

limited public forum which permits the City to impose lesser restrictions on [p. 101] speech, I find that the restrictions in this case are constitutional.

In the case of a limited purpose public forum, the government may create a forum, even if not officially required to do so, and limit that forum to particular groups or subject matter. *Bell v. Little Axe Independent School District, 766 F.2d 1391,* at page 1401, a 1985 decision; and also *Cornelius* and *Perry Education Association* from the U. S. Supreme Court.

The evidence supports the City's position that the purpose of the senior centers, as defined by the Older Americans Act, is to provide a variety of services, including recreation, health, nutrition, referral to senior citizen service providers and education. Mr. Perdue's affidavit at paragraph 8 and 42 United States Code Section 3002 subparagraph (35) from the West Supplement. By definition, this purpose does not include sectarian instruction or religious worship. *See* 42 U. S. Code Section 3027(14)(a)(iv).

Both parties agree that Jesus that the "Jesus" movie is patently religious in nature and is intended to spread the word that Jesus is the savior. In fact, plaintiffs' counsel concedes that the film's primary purpose is to proselytize. Therefore, I conclude that it is sectarian instruction and not [p. 102] within the limited purpose of the senior centers.

I also find the City is not restricting speech here on the basis of viewpoint. In *Lamb's Chapel,* it was clear that the school district had opened up the forum on family values and child rearing, yet it excluded instruction from

a Christian viewpoint. Here the City has not opened up the senior center forum for sectarian instruction. Therefore, no matter what viewpoint the speaker proposes, Christian, Jewish, Muslim, Hindu or whatever, the speaker may not offer sectarian instruction.

I'll put in my order that it's a matter of "potentially different" so you can take an immediate appeal.

MR. BULL: Thank you, Your Honor.

THE COURT: Or I'll convert it into summary judgment now and enter a summary judgment in favor of the City and you can take that up on appeal.

MR. BULL: We prefer that the whole thing be converted into summary judgment. That way we can take the whole thing up on that basis.

THE COURT: Everything that you've presented by way of exhibits will be part of the record. So – and I'll enter summary judgment, then, in favor of the City. Anything further?

[p. 103] MR. BULL: Not from the plaintiffs.

MR. WINTER: No, thank you.

THE COURT: We'll be in recess.

(Proceedings concluded.)

APPENDIX D

§ 3027. State plans

(a) Criteria for eligibility; contents

Except as provided in the succeeding sentence and section 3029(a) of this title, each State, in order to be eligible for grants from its allotment under this subchapter for any fiscal year, shall submit to the Assistant Secretary a State plan for a two-, three-, or four-year period determined by the State agency, with such annual revisions as are necessary, which meets such criteria as the Assistant Secretary may by regulation prescribe. If the Assistant Secretary determines, in the discretion of the Assistant Secretary, that a State failed in 2 successive years to comply with the requirements under this subchapter, then the State shall submit to the Assistant Secretary a State plan for a 1-year period that meets such criteria, for subsequent years until the Assistant Secretary determines that the State is in compliance with such requirements. Each such plan shall comply with all of the following requirements:

(1) The plan shall contain assurances that the State plan will be based upon area plans developed by area agencies on aging within the State designated under section 3025(a)(2)(A) of this title and that the State will prepare and distribute a uniform format for use by area agencies on aging in developing area plans under section 3026 of this title.

(2) The plan shall provide that each area agency on aging designated under section 3025(a)(2)(A) of this title will develop and submit to the State agency for approval an area plan

which complies with the provisions of section 3026 of this title.

(3)(A) The plan shall provide that the State agency will evaluate the need for supportive services (including legal assistance and transportation services), nutrition services, and multipurpose senior centers within the State and determine the extent to which existing public or private programs meet such need. To conduct the evaluation, the State agency shall use the procedures implemented under section 3012(a)(29) of this title.

(B) The plan shall provide assurances that the State agency will spend in each fiscal year, for services to older individuals residing in rural areas in the State assisted under this subchapter, an amount equal to not less than 105 percent of the amount expended for such services (including amounts expended under subchapter V and subchapter VII of this chapter) in fiscal year 1978.

(4) The plan shall provide for the use of such methods of administration (including methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Assistant Secretary shall exercise no authority with respect to the selection, tenure of office, or compensation of any individual employed in accordance with such methods) as are necessary for the proper and efficient administration of the plan, and, where necessary, provide for the reorganization and reassignment of functions to assure such efficient administration.

(5) The plan shall provide that the State agency will afford an opportunity for a hearing

upon request to any area agency on aging submitting a plan under this subchapter, to any provider of a service under such a plan, or to any applicant to provide a service under such a plan. The State agency shall establish and publish procedures for requesting and conducting such hearing.

(6) The plan shall provide that the State agency will make such reports, in such form, and containing such information, as the Assistant Secretary may require, and comply with such requirements as the Assistant Secretary may impose to insure the correctness of such reports.

(7)(A) The plan shall provide satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid to the recipients of a grant or contract.

(B) The plan shall provide assurances that –

(i) no individual (appointed or otherwise) involved in the designation of the State agency or an area agency on aging, or in the designation of the head of any subdivision of the State agency or of an area agency on aging, is subject to a conflict of interest prohibited under this chapter;

(ii) no officer, employee, or other representative of the State agency or an area agency on aging is subject to a conflict of interest prohibited under this chapter; and

(iii) mechanisms are in place to identify and remove conflicts of interest prohibited under this chapter.

(C) The plan shall provide assurances that the State agency and each area agency on aging will –

(i) maintain the integrity and public purpose of services provided, and service providers, under the State plan in all contractual and commercial relationships;

(ii) disclose to the Assistant Secretary –

(I) the identity of each nongovernmental entity with which the State agency or area agency on aging has a contract or commercial relationship relating to providing any service to older individuals; and

(II) the nature of such contract or such relationship;

(iii) demonstrate that a loss or diminution in the quantity or quality of the services provided, or to be provided, under this chapter by such agency has not resulted and will not result from such contract or such relationship;

(iv) demonstrate that the quantity or quality of the services to be provided under the State plan will be enhanced as a result of such contract or such relationship; and

(v) on the request of the Assistant Secretary, for the purpose of monitoring compliance with this chapter (including conducting an audit), disclose all sources

and expenditures of funds the State agency and area agency on aging receive or expend to provide services to older individuals.

(8) The plan shall provide that the State agency will conduct periodic evaluations of, and public hearings on, activities and projects carried out under the State plan, including an evaluation of the effectiveness of the State agency in reaching older individuals with greatest economic need and older individuals with greatest social need, with particular attention to low-income minority individuals. In conducting such evaluations and public hearings, the State agency shall solicit the views and experiences of entities that are knowledgeable about the needs and concerns of low-income minority older individuals.

(9) The plan shall provide for establishing and maintaining information and assistance services in sufficient numbers to assure that all older individuals in the State who are not furnished adequate information and assistance services under section 3026(a)(4) of this title will have reasonably convenient access to such services.

(10) The plan shall provide that no supportive services, nutrition services, or in-home services (as defined in section 3030i of this title) will be directly provided by the State agency or an area agency on aging, except where, in the judgment of the State agency, provision of such services by the State agency or an area agency on aging is necessary to assure an adequate supply of such services, or where such services are directly related to such State or area agency on aging's administrative functions, or where

such services of comparable quality can be provided more economically by such State or area agency on aging.

(11) The plan shall provide that subject to the requirements of merit employment systems of State and local governments –

(A) preference shall be given to older individuals; and

(B) special consideration shall be given to individuals with formal training in the field of aging (including an educational specialty or emphasis in aging and a training degree or certificate in aging) or equivalent professional experience in the field of aging;

for any staff positions (full time or part time) in State and area agencies for which such individuals qualify.

(12) The plan shall provide assurances that the State agency will carry out, through the Office of the State Long-Term Care Ombudsman, a State Long-Term Care Ombudsman program in accordance with section 3058g of this title and this subchapter.

(13) The plan shall provide with respect to nutrition services that –

(A) each project providing nutrition services will be available to older individuals and to their spouses, and may be made available to handicapped or disabled individuals who have not attained 60 years of age but who reside in housing facilities occupied primarily by older individuals at

which congregate nutrition services are provided;

(B) primary consideration shall be given to the provision of meals in a congregate setting, except that each area agency on aging (i) may award funds made available under this subchapter (other than under section 3023(b)(3) of this title) to organizations for the provision of home delivered meals to older individuals in accordance with the provisions of subpart II of part C of this subchapter, based upon a determination of need made by the recipient of a grant or contract entered into under this subchapter, without requiring that such organizations also provide meals to older individuals in a congregate setting; and (ii) shall, in awarding such funds, select such organizations in a manner which complies with the provisions of subparagraph (H);

(C)(i) each project will permit recipients of grants or contracts to solicit voluntary contributions for meals furnished in accordance with guidelines established by the Assistant Secretary, taking into consideration the income ranges of eligible individuals in local communities and other sources of income of the recipients of a grant or contract; and

(ii) such voluntary contributions will be used to increase the number of meals served by the project involved, to facilitate access to such meals, and to provide other supportive services directly related to nutrition services;

(D) in the case of meals served in a congregate setting, a site for such services and for comprehensive supportive services is furnished in as close proximity to the majority of eligible individuals' residences as feasible, with particular attention upon a multipurpose senior center, a school, a church, or other appropriate community facility, preferably within walking distance where possible, and where appropriate, transportation to such site is furnished;

(E) each project will establish outreach activities which assure that the maximum number of eligible individuals may have an opportunity to participate;

(F) each project will establish and administer the nutrition project with the advice of dietitians (or individuals with comparable expertise), persons competent in the field of service in which the nutrition project is being provided, older individuals who will participate in the program, and of persons who are knowledgeable with regard to the needs of older individuals;

(G) each project will provide special menus, where feasible and appropriate, to meet the particular dietary needs arising from the health requirements, religious requirements, or ethnic backgrounds of eligible individuals;

(H) each area agency on aging will give consideration, where feasible, in the furnishing of home delivered meals to the use of organizations which (i) have demonstrated an ability to provide home delivered meals efficiently and reasonably; and (ii)

furnish assurances to the area agency on aging that such an organization will maintain efforts to solicit voluntary support and that funds made available under this subchapter to the organization will not be used to supplant funds from non-Federal sources;

(I) each area agency on aging shall establish procedures that will allow nutrition project administrators the option to offer a meal, on the same basis as meals are provided to participating older individuals, to individuals providing volunteer services during the meal hours, and to individuals with disabilities who reside at home with and accompany older individuals who are eligible under this chapter;

(J) each nutrition project shall provide nutrition education on at least a semiannual basis to participants in programs described in part C of this subchapter;

(K) each project shall comply with applicable provisions of State or local laws regarding the safe and sanitary handling of food, equipment, and supplies used in the storage, preparation, service, and delivery of meals to an older individual;

(L) the State agency will monitor, coordinate, and assist in the planning of nutritional services, with the advice of a dietitian or an individual with comparable expertise; and

(M) the State agency will –

(i) develop nonfinancial criteria for eligibility to receive nutrition services under section 3030f of this title; and

(ii) periodically evaluate recipients of such services to determine whether they continue to meet such criteria.

(14) The plan shall provide, with respect to the acquisition (in fee simple or by lease for 10 years or more), alteration, or renovation of existing facilities (or the construction of new facilities in any area in which there are no suitable structures available, as determined by the State agency, after full consideration of the recommendations made by area agencies on aging, to be a focal point for the delivery of services assisted under this subchapter) to serve as multipurpose senior centers, that –

(A) the plan contains or is supported by reasonable assurances that (i) for not less than 10 years after acquisition, or not less than 20 years after the completion of construction, the facility will be used for the purpose for which it is to be acquired or constructed, unless for unusual circumstances the Assistant Secretary waives the requirement of this division; (ii) sufficient funds will be available to meet the non-Federal share of the cost of acquisition or construction of the facility; (iii) sufficient funds will be available when acquisition or construction is completed, for effective use of the facility for the purpose for which it is being acquired or constructed; and (iv) the facility will not be used and is not intended

to be used for sectarian instruction or as a place for religious worship;

(B) the plan contains or is supported by reasonable assurances that, in the case of purchase or construction, there are no existing facilities in the community suitable for leasing as a multipurpose senior center;

(C) the plans and specifications for the facility are in accordance with regulations relating to minimum standards of construction, promulgated with particular emphasis on securing compliance with the requirements of the Act of August 12, 1968, commonly known as the Architectural Barriers Act of 1968 [42 U.S.C. § 4151 et seq.];

(D) the plan contains or is supported by adequate assurance that any laborer or mechanic employed by any contractor or subcontractor in the performance of work on the facility will be paid wages at rates not less than those prevailing for similar work in the locality as determined by the Secretary of Labor in accordance with the Act of March 3, 1931 (40 U.S.C. §§ 276a-276a-5; commonly known as the Davis-Bacon Act), and the Secretary of Labor shall have, with respect to the labor standards specified in this subparagraph, the authority and functions set forth in reorganization plan numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267), and section 276c of Title 40; and

(E) the plan contains assurances that the State agency will consult with the Secretary of Housing and Urban Development

with respect to the technical adequacy of any proposed alteration or renovation.

(15) The plan shall provide that with respect to legal assistance –

(A) the plan contains assurances that area agencies on aging will (i) enter into contracts with providers of legal assistance which can demonstrate the experience or capacity to deliver legal assistance; (ii) include in any such contract provisions to assure that any recipient of funds under division (i) will be subject to specific restrictions and regulations promulgated under the Legal Services Corporation Act [42 U.S.C. § 2996 et seq.] (other than restrictions and regulations governing eligibility for legal assistance under such Act and governing membership of local governing boards) as determined appropriate by the Assistant Secretary; and (iii) attempt to involve the private bar in legal assistance activities authorized under this subchapter, including groups within the private bar furnishing services to older individuals on a pro bono and reduced fee basis;

(B) the plan contains assurances that no legal assistance will be furnished unless the grantee administers a program designed to provide legal assistance to older individuals with social or economic need and has agreed, if the grantee is not a Legal Services Corporation project grantee, to coordinate its services with existing Legal Services Corporation projects in the planning and service area in order to concentrate the use of funds provided under this subchapter on

individuals with the greatest such need; and the area agency on aging makes a finding, after assessment, pursuant to standards for service promulgated by the Assistant Secretary, that any grantee selected is the entity best able to provide the particular services;

(C) the State agency will provide for the coordination of the furnishing of legal services to older individuals within the State, and provide advice and technical assistance in the provision of legal assistance to older individuals within the State and support the furnishing of training and technical assistance for legal assistance for older individuals;

(D) the plan contains assurances, to the extent practicable, that legal services furnished under the plan will be in addition to any legal services for older individuals being furnished with funds from sources other than this chapter and that reasonable efforts will be made to maintain existing levels of legal services for older individuals; and

(E) the plan contains assurances that area agencies on aging will give priority to legal assistance related to income, health care, long-term care, nutrition, housing, utilities, protective services, defense of guardianship, abuse, neglect, and age discrimination.

(16) The plan shall provide, whenever the State desires to provide for a fiscal year for services for the prevention of abuse of older individuals –

(A) the plan contains assurances that any area agency on aging carrying out such services will conduct a program consistent with relevant State law and coordinated with existing State adult protective service activities for –

(i) public education to identify and prevent abuse of older individuals;

(ii) receipt of reports of abuse of older individuals;

(iii) active participation of older individuals participating in programs under this chapter through outreach, conferences, and referral of such individuals to other social service agencies or sources of assistance where appropriate and consented to by the parties to be referred; and

(iv) referral of complaints to law enforcement or public protective service agencies where appropriate;

(B) the State will not permit involuntary or coerced participation in the program of services described in this paragraph by alleged victims, abusers, or their households; and

(C) all information gathered in the course of receiving reports and making referrals shall remain confidential unless all parties to the complaint consent in writing to the release of such information, except that such information may be released to a law enforcement or public protective service agency.

(17) The plan shall provide assurances that each State will provide inservice training opportunities for personnel of agencies and programs funded under this chapter.

(18) The plan shall provide assurances that each State will assign personnel (one of whom shall be known as a legal assistance developer) to provide State leadership in developing legal assistance programs for older individuals throughout the State.

(19) The plan shall provide, with respect to education and training services, assurances that area agencies on aging may enter into grants and contracts with providers of education and training services which can demonstrate the experience or capacity to provide such services (except that such contract authority shall be effective for any fiscal year only to such extent, or in such amounts, as are provided in appropriations Acts).

(20) The plan shall provide assurances that, if a substantial number of the older individuals residing in any planning and service area in the State are of limited English-speaking ability, then the State will require the area agency on aging for each such planning and service area –

(A) to utilize, in the delivery of outreach services under section 3026(a)(2)(A) of this title, the services of workers who are fluent in the language spoken by a predominant number of such older individuals who are of limited English-speaking ability; and

(B) to designate an individual employed by the area agency on aging, or

available to such area agency on aging on a full-time basis, whose responsibilities will include –

(i) taking such action as may be appropriate to assure that counseling assistance is made available to such older individuals who are of limited English-speaking ability in order to assist such older individuals in participating in programs and receiving assistance under this chapter; and

(ii) providing guidance to individuals engaged in the delivery of supportive services under the area plan involved to enable such individuals to be aware of cultural sensitivities and to take into account effectively linguistic and cultural differences.

(21) The plan shall provide assurances that the State agency, in carrying out the State Long-Term Care Ombudsman program under subsection (a)(12) of this section, will expend not less than the total amount expended by the agency in fiscal year 1991 in carrying out such a program under this subchapter.

(22) The plan shall specify a minimum percentage of the funds received by each area agency on aging for part B of this subchapter that will be expended, in the absence of the waiver granted under section 3026(b)(1) of this title, by such area agency on aging to provide each of the categories of services specified in section 3026(a)(2) of this title.

(23) The plan shall, with respect to the fiscal year preceding the fiscal year for which such plan is prepared –

(A) identify the number of low-income minority older individuals in the State; and

(B) describe the methods used to satisfy the service needs of such minority older individuals.

(24) The plan shall provide assurances that the State agency will require outreach efforts that will –

(A) identify individuals eligible for assistance under this chapter, with special emphasis on –

(i) older individuals residing in rural areas;

(ii) older individuals with greatest economic need (with particular attention to low-income minority individuals);

(iii) older individuals with greatest social need (with particular attention to low-income minority individuals);

(iv) older individuals with severe disabilities;

(v) older individuals with limited English-speaking ability; and

(vi) older individuals with Alzheimer's disease or related disorders with neurological and organic

brain dysfunction (and the caretakers of such individuals); and

(B) inform the older individuals referred to in clauses (i) through (vi) of subparagraph (A), and the caretakers of such individuals, of the availability of such assistance.

(25) The plan shall provide, with respect to the needs of older individuals with severe disabilities, assurances that the State will coordinate planning, identification, assessment of needs, and service for older individuals with disabilities with particular attention to individuals with severe disabilities with the State agencies with primary responsibility for individuals with disabilities, including severe disabilities, and develop collaborative programs, where appropriate, to meet the needs of older individuals with disabilities.

(26) The plan shall provide assurances that area agencies on aging will conduct efforts to facilitate the coordination of community-based, long-term care services, pursuant to section 3026(a)(6)(I) of this title, for older individuals who –

(A) reside at home and are at risk of institutionalization because of limitations on their ability to function independently;

(B) are patients in hospitals and are at risk of prolonged institutionalization; or

(C) are patients in long-term care facilities, but who can return to their homes if community-based services are provided to them.

(27) The plan shall provide assurances of consultation and coordination in planning and provision of in-home services under section 3030h of this title with State and local agencies and private nonprofit organizations which administer and provide services relating to health, social services, rehabilitation, and mental health services.

(28) The plan shall provide assurances that if the State receives funds appropriated under section 3023(e) of this title, the State agency and area agencies on aging will expend such funds to carry out part E of this subchapter.

(29) The plan shall, with respect to the fiscal year preceding the fiscal year for which such plan is prepared, describe the methods used to satisfy the service needs of older individuals who reside in rural areas.

(30) The plan shall include the assurances and description required by section 3058d(a) of this title.

(31)(A) If 50 percent or more of the area plans in the State provide for an area volunteer services coordinator, as described in section 3026(a)(12) of this title, the State plan shall provide for a State volunteer services coordinator, who shall –

(i) encourage area agencies on aging to provide for area volunteer services coordinators;

(ii) coordinate the volunteer services offered between the various area agencies on aging;

(iii) encourage, organize, and promote the use of older individuals as volunteers to the State;

(iv) provide technical assistance, which may include training, to area volunteer services coordinators; and

(v) promote the recognition of the contribution made by volunteers to the programs administered under the State plan.

(B) If fewer than 50 percent of the area plans in the State provide for an area volunteer services coordinator, the State plan may provide for the State volunteer services coordinator described in subparagraph (A).

(32) The plan shall provide assurances that special efforts will be made to provide technical assistance to minority providers of services.

(33) The plan –

(A) shall include the statement and the demonstration required by paragraphs (2) and (4) of section 3025(d) of this title; and

(B) may not be approved unless the Assistant Secretary approves such statement and such demonstration.

(34) The plan shall provide an assurance that the State agency will coordinate programs under this subchapter and subchapter X of this chapter, if applicable.

(35) The plan shall –

(A) provide an assurance that the State agency will pursue activities to

increase access by older individuals who are Native Americans to all aging programs and benefits provided by the agency, including programs and benefits under this subchapter, if applicable; and

(B) specify the ways in which the State agency intends to implement the activities.

(36) If case management services are offered to provide access to supportive services, the plan shall provide that the State agency shall ensure compliance with the requirements specified in section 3026(a)(20) of this title.

(37) The plan shall identify for each fiscal year, the actual and projected additional costs of providing services under this subchapter, including the cost of providing access to such services, to older individuals residing in rural areas in the State (in accordance with a standard definition of rural areas specified by the Assistant Secretary).

(38) The plan shall provide assurances that funds received under this subchapter will not be used to pay any part of a cost (including an administrative cost) incurred by the State or an area agency on aging to carry out a contract or commercial relationship that is not carried out to implement this subchapter.

(39) The plan shall provide assurances that preference in receiving services under this subchapter will not be given by the area agency on aging to particular older individuals as a result of a contract or commercial relationship that is not carried out to implement this subchapter.

(40) The plan shall provide assurances that if the State receives funds appropriated under

section 3023(g) of this title the State agency and area agencies on aging will expend such funds to carry out part G of this subchapter.

(41) The plan shall provide assurances that demonstrable efforts will be made –

(A) to coordinate services provided under this chapter with other State services that benefit older individuals; and

(B) to provide multigenerational activities, such as opportunities for older individuals to serve as mentors or advisers in child care, youth day care, educational assistance, at-risk youth intervention, juvenile delinquency treatment, and family support programs.

(42) The plan shall provide assurances that the State will coordinate public services within the State to assist older individuals to obtain transportation services associated with access to services provided under this subchapter, to services under subchapter X of this chapter, to comprehensive counseling services, and to legal assistance.

(43) The plan shall provide that the State agency shall issue guidelines applicable to grievance procedures required by section 3026(a)(6)(P) of this title.

(44) The plan shall include assurances that the State has in effect a mechanism to provide for quality in the provision of in-home services under this subchapter.

(b) Approval by Assistant Secretary; waiver of requirements

(1) The Assistant Secretary shall approve any State plan which the Assistant Secretary finds fulfills the requirements of subsection (a) of this section, except the Assistant Secretary may not approve such plan unless the Assistant Secretary determines that the formula submitted under section 3025(a)(2)(D) of this title complies with the guidelines in effect under section 3025(a)(2)(C) of this title.

(2) The Assistant Secretary, in approving any State plan under this section, may waive the requirement described in paragraph (3)(B) of subsection (a) of this section if the State agency demonstrates to the Assistant Secretary that the service needs of older individuals residing in rural areas in the State are being met, or that the number of older individuals residing in such rural areas is not sufficient to require the State agency to comply with such requirement.

(c) Notice and hearing prior to disapproval

(1) The Assistant Secretary shall not make a final determination disapproving any State plan, or any modification thereof, or make a final determination that a State is ineligible under section 3025 of this title, without first affording the State reasonable notice and opportunity for a hearing.

(2) Not later than 30 days after such final determination, a State dissatisfied with such final determination may appeal such final determination to the Secretary

for review. If the State timely appeals such final determination in accordance with subsection (e)(1) of this section, the Secretary shall dismiss the appeal filed under this paragraph.

(3) If the State is dissatisfied with the decision of the Secretary after review under paragraph (2), the State may appeal such decision not later than 30 days after such decision and in the manner described in subsection (e) of this section. For purposes of appellate review under the preceding sentence, a reference in subsection (e) of this section to the Assistant Secretary shall be deemed to be a reference to the Secretary.

(d) Discontinuance of payments; disbursement of withheld funds to agencies with approved plans; matching funds

Whenever the Assistant Secretary, after reasonable notice and opportunity for a hearing to the State agency, finds that –

(1) the State is not eligible under section 3025 of this title,

(2) the State plan has been so changed that it no longer complies substantially with the provisions of subsection (a) of this section, or

(3) in the administration of the plan there is a failure to comply substantially with any such provision of subsection (a) of this section,

the Assistant Secretary shall notify such State agency that no further payments from its allotments under section 3024 of this title and section 3028 of this title will be made to the State (or, in the Assistant Secretary's discretion,

that further payments to the State will be limited to projects under or portions of the State plan not affected by such failure), until the Assistant Secretary is satisfied that there will no longer be any failure to comply. Until the Assistant Secretary is so satisfied, no further payments shall be made to such State from its allotments under section 3024 of this title and section 3028 of this title (or payments shall be limited to projects under or portions of the State plan not affected by such failure). The Assistant Secretary shall, in accordance with regulations the Assistant Secretary shall prescribe, disburse the funds so withheld directly to any public or nonprofit private organization or agency or political subdivision of such State submitting an approved plan in accordance with the provisions of this section. Any such payment shall be matched in the proportions specified in section 3024 of this title.

(e) Appeal

(1) A State which is dissatisfied with a final action of the Assistant Secretary under subsection (b), (c), or (d) of this section may appeal to the United States court of appeals for the circuit in which the State is located, by filing a petition with such court within 30 days after such final action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Assistant Secretary, or any officer designated by the Assistant Secretary for such purpose. The Assistant Secretary thereupon shall file in the court the record of the proceedings on which the Assistant Secretary's action is based, as provided in section 2112 of Title 28.

(2) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Assistant Secretary or to set it aside, in whole or in part, temporarily or permanently, but until the filing of the record, the Assistant Secretary may modify or set aside the Assistant Secretary's order. The findings of the Assistant Secretary as to the facts, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Assistant Secretary to take further evidence, and the Assistant Secretary shall, within 30 days, file in the court the record of those further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence. The judgment of the court affirming or setting aside, in whole or in part, any action of the Assistant Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(3) The commencement of proceedings under this subsection shall not, unless so specifically ordered by the court, operate as a stay of the Assistant Secretary's action.

(f) Confidentiality of information relating to legal assistance; protection of commercial information

(1) Neither a State, nor a State agency, may require any provider of legal assistance under this subchapter to reveal any information that is protected by the attorney-client privilege.

(2) Information disclosed under section 3026(a)(14)(B)(i) of this title or subsection (a)(7)(C)(ii)(I) of this section may be disclosed to the public by the State

agency or the State only if such information could be disclosed under section 552 of Title 5 by an agency of the United States.

(Pub. L. 89-73, Title III, § 307, as added Pub. L. 95-478, Title I, § 103(b), Oct. 18, 1978, 92 Stat. 1524; amended Pub. L. 97-115, §§ 3(d), 7, Dec. 29, 1981, 95 Stat. 1597, 1598; Pub. L. 98-459, Title III, § 307, Oct. 9, 1984, 98 Stat. 1775; Pub. L. 100-175, Title I, §§ 128, 129(d), (e), 130(b), 131(b), 132(c), 136(c), 137(b), 138, 140(c), 141(c), 142, 144(d), 155(e)(2), 182(k), Nov. 29, 1987, 101 Stat. 934, 935, 938, 939, 940, 943, 944, 946, 947, 949, 953, 965; Pub. L. 100-628, Title VII, § 705(6), Nov. 7, 1988, 102 Stat. 3247; Pub. L. 102-375, Title I, § 102(b)(4), (5), (10)(A), (C), (E), (F), Title III, § 307, Title VII, § 708(c)(4), Title IX, § 904(a)(13), Sept. 30, 1992, 106 Stat. 1201, 1202, 1228, 1293, 1308; Pub. L. 103-171, §§ 2(9), 3(a)(5), Dec. 2, 1993, 107 Stat. 1988, 1990.)

REFERENCES IN TEXT

Subchapter V and subchapter VII of this chapter, referred to in subsec. (a)(3)(B), were repealed by Pub. L. 95-478, Title V, § 501(a), Oct. 18, 1978, 92 Stat. 1558.

Act of August 12, 1968, commonly known as the Architectural Barriers Act of 1968, referred to in subsec. (a)(14)(C), is Pub. L. 90-480, Aug. 12, 1968, 82 Stat. 718, as amended, which is classified generally to chapter 51 (section 4151 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4151 of this title and Tables.

Act of March 3, 1931 (40 U.S.C. 276a-276a-5; commonly known as the Davis-Bacon Act), referred to in subsec. (a)(14)(D), is Act Mar. 3, 1931, ch. 411, 46 Stat. 1494, as amended, which is classified generally to sections 276a to 276a-5 of Title 40, Public Buildings, Property, and Works. For complete classification of this Act to the

Code, see Short Title note set out under section 276a of Title 40 and Tables.

Reorganization plan numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267), referred to in subsec. (a)(14)(D), is set out in the Appendix to Title 5, Government Organization and Employees.

The Legal Services Corporation Act, referred to in subsec. (a)(15)(A), is Title X of Pub. L. 88-452, as added by Pub. L. 93-355, § 2, July 25, 1974, 88 Stat. 378, as amended, which is classified generally to subchapter X (§ 2996 et seq.) of chapter 34 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2996 of this title and Tables.

PRIOR PROVISIONS

A prior section 3027, Pub. L. 89-73, title III, § 307, as added Pub. L. 93-29, title III, § 301, May 3, 1973, 87 Stat. 44, related to payment of grants or contracts, prior to the general amendment of this subchapter by Pub. L. 95-478. See section 3029 of this title.

Provisions similar to those comprising this section were contained in Pub. L. 89-73, title III, § 305, as added Pub. L. 93-29, title III, § 301, May 3, 1973, 87 Stat. 41; Pub. L. 94-135, title I, §§ 106(a), (b), 114(e), Nov. 28, 1975, 89 Stat. 715, 725, which was classified to section 3025 of this title prior to repeal by Pub. L. 95-478.

AMENDMENTS

1993 – Pub. L. 103-171, § 3(a)(5)(B), substituted "Assistant Secretary" for "Commissioner" wherever appearing.

Subsec. (a)(8). Pub. L. 103-171, § 2(9)(A)(i), substituted "knowledgeable" for "knowledgable".

Subsec. (a)(24). Pub. L. 103-171, § 2(9)(A)(ii), substituted period for semicolon at end.

Subsec. (b)(2). Pub. L. 103-171, § 2(9)(B), substituted "such requirement" for "the requirement described in clause (3)(B) of subsection (a) of this section".

Subsecs. (d), (e). Pub. L. 103-171, § 3(a)(5)(A), substituted "Assistant Secretary's" for "Commissioner's" wherever appearing.

1992 – Subsec. (a). Pub. L. 102-375, § 307(a)(1), (2), inserted "the succeeding sentence and" after "provided in" in first sentence and inserted after first sentence "If the Commissioner determines, in the discretion of the Commissioner, that a State failed in 2 successive years to comply with the requirements under this subchapter, then the State shall submit to the Commissioner a State plan for a 1-year period that meets such criteria, for subsequent years until the Commissioner determines that the State is in compliance with such requirements." before "Each such plan shall comply".

Subsec. (a)(1). Pub. L. 102-375, § 102(b)(10)(F), substituted "agencies on aging in" for "agencies in".

Subsec. (a)(3)(A). Pub. L. 102-375, § 307(a)(3), inserted "and transportation services" after "legal assistance"

and inserted at end "To conduct the evaluation, the State agency shall use the procedures implemented under section 3012(a)(29) of this title."

Subsec. (a)(5). Pub. L. 102-375, § 307(b), inserted at end "The State agency shall establish and publish procedures for requesting and conducting such hearing."

Subsec. (a)(7). Pub. L. 102-375, § 307(c), designated existing provisions as subpar. (A) and added subpars. (B) and (C).

Subsec. (a)(8). Pub. L. 102-375, § 904(a)(13)(A)(i), substituted "greatest economic need and older individuals with greatest social need" for "the greatest economic or social needs".

Pub. L. 102-375, § 307(d), inserted at end "In conducting such evaluations and public hearings, the State agency shall solicit the views and experiences of entities that are knowledgeable about the needs and concerns of low-income minority older individuals."

Subsec. (a)(9). Pub. L. 102-375, § 102(b)(4), substituted "information and assistance" for "information and referral" in two places.

Subsec. (a)(10). Pub. L. 102-375, 102(b)(5), substituted "section 3030i of this title" for "section 3030i(1) of this title".

Subsec. (a)(11). Pub. L. 102-375, § 307(e), substituted "governments –" for "governments, preference shall be given to individuals aged 60 or older", and added subpars. (A) and (B).

Subsec. (a)(12). Pub. L. 102-375, § 307(f), amended par. (12) generally, substituting provisions requiring the plan to provide assurances that a State Long-Term Care Ombudsman program be carried out in accordance with section 3058g of this title for provisions setting out, in subpars. (A) to (K), the assurances required to be provided by the plan with respect to such a program.

Subsec. (a)(13)(A). Pub. L. 102-375, § 904(a)(13)(A)(ii)(I), (II), substituted " to older individuals" for "to individuals aged 60 or older" and "by older individuals" for "by the elderly".

Subsec. (a)(13)(B). Pub. L. 102-375, § 904(a)(13)(A)(ii)(III), substituted "subparagraph" for "subclause".

Pub. L. 102-375, § 307(g)(1), inserted "(other than under section 3023(b)(3) of this title)" after "available under this subchapter".

Pub. L. 102-375, § 102(b)(10)(C), substituted "area agency on aging" for "area agency".

Subsec. (a)(13)(F). Pub. L. 102-375, § 307(g)(2), inserted "dietitians (or individuals with comparable experience)," after "advice of" and substituted "project will" for "project may".

Subsec. (a)(13)(H). Pub. L. 102-375, § 307(g)(3), struck out "and" at end.

Pub. L. 102-375, § 102(b)(10)(E), substituted "area agency on aging" for "area agency" in two places.

Subsec. (a)(13)(H). Pub. L. 102-375, § 904(a)(13)(A)(ii)(IV), substituted "participating older individuals" for "elderly participants".

Pub. L. 102-375, § 307(g)(4), substituted semicolon for period at end.

Pub. L. 102-375, § 102(b)(10)(C), substituted "area agency on aging" for "area agency".

Subsec. (a)(13)(J) to (M). Pub. L. 102-375, § 307(g)(5), added subpars. (J) to (M).

Subsec. (a)(14). Pub. L. 102-375, § 102(b)(10)(A), substituted "area agencies on aging" for "area agencies".

Subsec. (a)(14)(D). Pub. L. 102-375, § 904(a)(13)(A)(iii), substituted "subparagraph" for "clause".

Subsec. (a)(15)(B). Pub. L. 102-375, § 102(b)(10)(C), substituted "area agency on aging" for "area agency".

Subsec. (a)(15)(E). Pub. L. 102-375, § 307(h), added subpar. (E).

Subsec. (a)(16). Pub. L. 102-375, § 307(i), substituted "shall provide," for "shall provide that" and "provide for a" for ", if funds are not appropriated under section 3023(g) of this title for a fiscal year, provide that for such".

Subsec. (a)(16)(B). Pub. L. 102-375, § 904(a)(13)(A)(iv), substituted "paragraph" for "clause".

Subsec. (a)(18). Pub. L. 102-375, § 307(j), inserted "(one of whom shall be known as a legal assistance developer)" after "personnel".

Subsec. (a)(20)(A). Pub. L. 102-375, § 708(c)(4), substituted "section 3026(a)(2)(A) of this title" for "sections 3026(a)(2)(A) and 3026(a)(6)(P) of this title".

Subsec. (a)(21). Pub. L. 102-375, § 307(k), amended par. (21) generally. Prior to amendment, par. (21) read as follows: "The State plan shall provide that the State agency, from funds allotted under section 3024(a) of this title for part B of this subchapter and for paragraph (12) (relating to the State long-term care ombudsman) shall expend to carry out paragraph (12), for each fiscal year in which the allotment for part B of this subchapter for the State is not less than the allotment for fiscal year 1987 for part B of this subchapter for such State, an amount which is not less than the amount expended from funds received under this chapter by such State in fiscal year 1987 to carry out paragraph (12) as in effect before the effective date of the Older Americans Act Amendments of 1987. This paragraph shall not apply to American Samoa, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands."

Subsec. (a)(22). Pub. L. 102-375, § 102(b)(10)(E), substituted "area agency on aging" for "area agency" in two places.

Subsec. (a)(24). Pub. L. 102-375, § 307(*l*), amended par. (24) generally. Prior to amendment, par. (24) read as follows: "The plan shall provide assurances that the State agency will require outreach efforts that will –

> "(A) identify older individuals who are eligible for assistance under this chapter, with special emphasis on older individuals with greatest

economic need (with particular attention to low-income minority individuals), older individuals with greatest social need (with particular attention to low-income minority individuals), and older individuals who reside in rural areas; and

"(B) inform such individuals of the availability of such assistance."

Subsec. (a)(30). Pub. L. 102-375, § 307(m), amended par. (30) generally. Prior to amendment, par. (30) read as follows: "The plan shall provide assurances that if the State receives funds appropriated under section 3023(g) of this title, the State agency and area agencies on aging will expend such funds to carry out part G of this subchapter".

Subsec. (a)(31). Pub. L. 102-375, § 307(n), amended par. (31) generally, substituting provisions relating to an area or State volunteer services coordinator for provisions that State agency make funds available to eligible area agencies on aging based on number of older individuals with greatest economic need and inadequacy of outreach activities and application assistance, that State agency require area agency to submit application describing and evaluating activities for which funds were sought, that State agency distribute to area agencies certain eligibility information, and that State agency submit to Commissioner a report on evaluations required to be submitted to it by area agencies.

Subsec. (a)(32) to (44). Pub. L. 102-375, § 307(n), added pars. (32) to (44).

Subsec. (b)(1). Pub. L. 102-375, § 307(*o*), inserted before period at end ", except the Commissioner may not

approve such plan unless the Commissioner determines that the formula submitted under section 3025(a)(2)(D) of this title complies with the guidelines in effect under section 3025(a)(2)(C) of this title".

Subsec. (b)(2). Pub. L. 102-375, § 904(a)(13)(B), substituted "described in paragraph" for "described in clause".

Subsec. (c). Pub. L. 102-375, § 307(p), designated existing provisions as par. (1) and added pars. (2) and (3).

Subsec. (f). Pub. L. 102-375, § 307(q), (r), redesignated subsec. (g) as subsec. (f)(1), added subsec. (f)(2), and struck out former subsec. (f), which related to demonstration projects for health and nutrition education.

Subsec. (g). Pub. L. 102-375, § 307(r)(1), redesignated subsec. (g) as subsec. (f)(1).

1988 – Subsec. (a)(3)(A). Pub. L. 100-628 substituted a period for "; and" at end.

1987 – Subsec. (a). Pub. L. 100-175, § 182(k)(1), substituted "Each such plan shall comply with all of the following requirements:" for "Each such plan shall –".

Subsec. (a)(1). Pub. L. 100-175, § 182(k)(2), (3), inserted "The plan shall" and substituted a period for semicolon.

Subsec. (a)(3)(A). Pub. L. 100-175, § 182(k)(4)(A), inserted "The plan shall".

Subsec. (a)(3)(B), (4) to (7). Pub. L. 100-175, § 182(k)(4)(B), (5)-(8), inserted "The plan shall" and substituted a period for semicolon.

Subsec. (a)(3), Pub. L. 100-175, § 182(k)(9), inserted "The plan shall" and substituted a period for semicolon.

Pub. L. 100-175, § 132(c)(1), inserted ", including an evaluation of the effectiveness of the State agency in reaching older individuals with the greatest economic or social needs, with particular attention to low-income minority individuals" before semicolon.

Pub. L. 100-175, § 128, inserted ", and public hearings on," after "evaluations of".

Subsec. (a)(9). Pub. L. 100-175, § 182(k)(10), inserted "The plan shall" and substituted a period for semicolon.

Subsec. (a)(10). Pub. L. 100-175, § 182(k)(11), inserted "The plan shall" and substituted a period for semicolon.

Pub. L. 100-175, § 140(c)(1), which directed that par. (10) be amended by substituting "nutrition services, or in-home services (as defined in section 3030i(1) of this title)" for "including nutrition services,", was executed by making the substitution for "or nutrition services," to reflect the probable intent of Congress and a previous amendment made by Pub. L. 98-459, § 307(a)(2). See 1984 Amendment note below.

Subsec. (a)(11). Pub. L. 100-175, § 182(k)(12), inserted "The plan shall" and substituted a period for semicolon.

Subsec. (a)(12)(A). Pub. L. 100-175, § 129(d), amended par. (12) generally, revising and restating as subpars. (A) to (K) provisions of former subpars. (A) to (E).

Subsec. (a)(13). Pub. L. 100-175, § 182(k)(13), inserted "The plan shall" and in subpar. (I) substituted a period for semicolon.

Subsec. (a)(13)(I). Pub. L. 100-175, § 136(c)(1), inserted ", and to individuals with disabilities who reside at home with and accompany older individuals who are eligible under this chapter" before semicolon.

Subsec. (a)(14). Pub. L. 100-175, § 182(k)(14), inserted "The plan shall" and in subpar. (E) substituted a period for semicolon.

Subsec. (a)(15). Pub. L. 100-175, § 182(k)(15), inserted "The plan shall" and in subpar. (D) substituted a period for semicolon.

Subsec. (a)(16). Pub. L. 100-175, § 182(k)(16), inserted "The plan shall" and in subpar. (C) substituted a period for semicolon.

Pub. L. 100-175, § 144(d)(1), substituted ", if funds are not appropriated under section 3023(g) of this title for a fiscal year, provide that for such fiscal year" for second reference to "provide".

Subsec. (a)(17) to (19). Pub. L. 100-175, § 182(k)(17)-(19), inserted "The plan shall" and substituted a period for semicolon.

Subsec. (a)(20). Pub. L. 100-175, § 182(k)(20), inserted "The plan shall" and in subpar. (B)(ii) substituted a period for "; and".

Subsec. (a)(20)(A). Pub. L. 100-175, § 155(e)(2)(A), substituted "sections 3026(a)(2)(A) and 3026(a)(6)(P) of this title" for "section 3026(a)(2)(A) of this title".

Subsec. (a)(21). Pub. L. 100-175, § 129(e), amended par. (21) generally. Prior to amendment, par. (21) read as

follows: "provide that the State agency, from funds allotted under section 3024(a) of this title for part B will use an amount equal to an amount not less than 1 percent of such allotment or $20,000, whichever is greater, for the purpose of carrying out the provisions of clause (12), except that (A) the requirement of this clause shall not apply in any fiscal year in which a State spends from State or local sources an amount equal to the amount required to be spent by this clause; and (B) the provisions of this clause shall not apply to American Samoa, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands."

Subsec. (a)(22). Pub. L. 100-175, § 130(b), added par. (22).

Subsec. (a)(23). Pub. L. 100-175, § 131(b), added par. (23).

Subsec. (a)(24). Pub. L. 100-175, § 132(c)(2), added par. (24).

Subsec. (a)(25). Pub. L. 100-175, § 136(c)(2), added par. (25).

Subsec. (a)(26). Pub. L. 100-175, § 138, added par. (26).

Subsec. (a)(27). Pub. L. 100-175, § 140(c)(2), added par. (27).

Subsec. (a)(28). Pub. L. 100-175, § 141(c), added par. (28).

Subsec. (a)(29). Pub. L. 100-175, § 142, added par. (29).

Subsec. (a)(30). Pub. L. 100-175, § 144(d)(2), added par. (30).

Subsec. (a)(31). Pub. L. 100-175, § 155(e)(2)(B), added par. (31).

Subsec. (g). Pub. L. 100-175, § 137(b), added subsec. (g).

1984 – Subsec. (a)(3)(A). Pub. L. 98-459, § 307(a)(1), substituted "legal assistance" for "legal services".

Subsec. (a)(10). Pub. L. 98-459, § 307(a)(2), substituted "supportive services or nutrition services" for "supportive services, including nutrition services", and inserted ", or where such services are directly related to such State or area agency on aging's administrative functions, or where such services of comparable quality can be provided more economically by such State or area agency on aging".

Subsec. (a)(12)(A). Pub. L. 98-459, § 307(a)(3)(A)-(C), substituted ", other than an agency or organization which is responsible" for "which is not responsible", "which is an association" for "which is not an association", and "which provides an individual who will, on a full-time basis –" for "which will –" in provisions preceding cl. (i).

Subsec. (a)(12)(A)(iv). Pub. L. 98-459, § 307(a)(3)(D), substituted "training staff and volunteers" for "training volunteers".

Subsec. (a)(12)(E). Pub. L. 98-459, § 307(a)(3)(E)-(G), added subpar. (E).

Subsec. (a)(13)(B). Pub. L. 98-459, § 307(a)(4)(A), substituted "subclause (H)" for "subparagraph (H)".

Subsec. (a)(13)(C)(i). Pub. L. 98-459, § 307(a)(4)(B), substituted "solicit voluntary contributions" for "charge participating individuals".

Subsec. (a)(13)(C)(ii). Pub. L. 98-459, § 307(a)(4)(C), substituted "voluntary contributions" for "charges".

Subsec. (a)(15). Pub. L. 98-459, § 307(a)(5), substituted "legal assistance" for "legal services" wherever appearing.

Subsec. (a)(15)(A). Pub. L. 98-459, § 307(a)(5), substituted "legal assistance" for "legal services" wherever appearing.

Subsec. (a)(15)(B). Pub. L. 98-459, § 307(a)(6), in amended subpar. (B) generally, substituted provisions requiring assurances regarding the furnishing of legal assistance by grantees administering programs designed to provide legal assistance to older individuals with social or economic need for provisions requiring assurances regarding the furnishing of legal services by grantees who were either recipients of funds under the Legal Services Corporation Act or who administered programs designed to provide legal services to all older individuals with social or economic need.

Subsec. (a)(16) to (18). Pub. L. 98-459, § 307(a)(10), added pars. (16) to (18). Former pars. (16) to (18) redesignated (19) to (21), respectively.

Subsec. (a)(19), (20). Pub. L. 98-459, § 307(a)(9), redesignated former pars. (16) and (17) as (19) and (20), respectively.

Subsec. (a)(20)(B)(ii). Pub. L. 98-459, § 307(a)(7), substituted "; and" for the period at the end.

Subsec. (a)(21). Pub. L. 98-459, § 307(a)(9), redesignated former par. (18) as (21).

Subsec. (a)(21)(B). Pub. L. 98-459, § 307(a)(8), substituted "Commonwealth of the Northern Mariana Islands" for "Northern Mariana Islands".

Subsec. (b)(1). Pub. L. 98-459, § 307(b), substituted "the Commissioner finds" for "he finds".

Subsec. (d). Pub. L. 98-459, § 307(c), substituted "in the Commissioner's discretion" for "in his discretion", "until the Commissioner is satisfied" for "until he is satisfied", "Until the Commissioner is so satisfied" for "Until he is so satisfied", "the Commissioner shall prescribe" for "he shall prescribe", and "the provisions of this section" for "the provisions of section 307".

Subsec. (e)(1). Pub. L. 98-459, § 307(d)(1), substituted "designated by the Commissioner" for "designated by him" and "the Commissioner's action is based" for "he based his action".

Subsec. (e)(2). Pub. L. 98-459, § 307(d)(2), substituted "set aside the Commissioner's order" for "set aside his order".

Subsec. (f). Pub. L. 98-459, § 307(e), added subsec. (f).

1981 – Subsec. (a). Pub. L. 97-115, § 7(a), substituted "for a two-, three-, or four-year period determined by the State agency," for "for a 3-year period," in the provisions preceding par. (1).

Subsec. (a)(3)(A), (10). Pub. L. 97-115, § 3(d), substituted "supportive services" for "social services".

Subsec. (a)(13)(A). Pub. L. 97-115, § 7(b), substituted "aged 60 or older and to their spouses, and may be made available to handicapped or disabled individuals who have not attained 60 years of age but who reside in housing facilities occupied primarily by the elderly at which congregate nutrition services are provided" for "aged 60 or older, and to their spouses".

Subsec. (a)(13)(B). Pub. L. 97-115, § 7(c), substituted "primary consideration shall be given to the provision of meals in a congregate setting, except that each area agency (i) may award funds made available under this subchapter to organizations for the provision of home delivered meals to older individuals in accordance with the provisions of subpart II of part C, based upon a determination of need made by the recipient of a grant or contract entered into under this subchapter, without requiring that such organizations also provide meals to older individuals in a congregate setting; and (ii) shall, in awarding such funds, select such organizations in a manner which complies with the provisions of subparagraph (H)" for "each project will provide meals in a congregate setting, except that each such project may provide home delivered meals based upon determination of need made by the recipient of a grant or contract entered into under this subchapter".

Subsec. (a)(13)(C)(ii). Pub. L. 97-115, § 7(d), inserted ", to facilitate access to such meals, and to provide other supportive services directly related to nutrition services" after "the project involved".

Subsec. (a)(13)(D). Pub. L. 97-115, §§ 3(d), 7(e), inserted "in the case of meals served in a congregate setting,"

before "a site for such services", substituted "supportive services" for "social services", and struck out "or home delivered meals are furnished to eligible individuals who are homebound" after "transportation to such site is furnished".

Subsec. (a)(13)(I). Pub. L. 97-115, § 7(f), substituted "each area agency shall establish procedures that will allow nutrition project administrators the option to offer a meal, on the same basis as meals are provided to elderly participants, to individuals providing volunteer services during the meal hours" for "each State agency may only for fiscal years 1979 and 1980, use not to exceed 20 percent for the amounts allotted under part C to the State for supportive services, including recreational activities, informational services, health and welfare counseling, and referral services, directly related to the delivery of congregate or home delivered meals, except that the Commissioner may approve an application from a State to use not to exceed 50 percent of its amount allotted under part C in areas with unusually high supportive services costs".

Subsec. (a)(16) to (18). Pub. L. 97-115, § 7(g), added pars. (16) and (17) and redesignated former par. (16) as (18).

Subsec. (b)(2). Pub. L. 97-115, § 7(h), redesignated par. (3) as (2). Former par. (2), which related to the authority of the Commissioner to waive particular requirements of State plans for fiscal years 1979 and 1980, was struck out.

Effective Date of 1992 Amendment

Amendment by sections 307 and 708(c)(4) of Pub. L. 102-375 inapplicable with respect to fiscal year 1993, see section 4(b) of Pub. L. 103-171, set out as a note under section 3001 of this title.

Amendment by sections 307 and 708(c)(4) of Pub. L. 102-375 inapplicable with respect to fiscal year 1992, see section 905(b)(2), (6) of Pub. L. 102-375, set out as a note under section 3001 of this title.

Effective Date of 1987 Amendment

Amendment by Pub. L. 100-175 effective Oct. 1, 1987, except not applicable with respect to any area plan submitted under section 3026(a) of this title or any State plan submitted under section 3027(a) of this title and approved for any fiscal year beginning before Nov. 29, 1987, see section 701(a), (b) of Pub. L. 100-175, set out as a note under section 3001 of this title.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98-459 to take effect Oct. 9, 1984, see section 803(a) of Pub. L. 98-459, set out as a note under section 3001 of this title.

Assessment of Unsatisfied Demand for Supportive Services Provided at Senior Centers and Other Sites

Section 111 of Pub. L. 100-175 directed Commissioner on Aging, not later than Sept. 30, 1989, to submit to

Congress a report assessing national unmet need for supportive services, nutrition services, and multipurpose senior centers by summarizing in detail for each State the results of the most recent evaluation conducted by the State agency under the then current plan submitted under section 307(a)(3)(A) and containing recommendations of the Secretary with respect to the for administrative action and legislation relating to satisfying the demand for supportive services provided at senior centers and other sites.

Study of Ombudsman Program

Section 129(b) of Pub. L. 100-175 directed Commissioner on Aging, not later than Dec. 31, 1989, to conduct a study and submit a report to Congress concerning involvement in the ombudsman program established under 42 U.S.C. 3027(a)(12) and its impact upon issues and problems affecting residents of board and care facilities and other similar adult care homes who are older individuals as defined in 42 U.S.C. 3022(10), and the effectiveness of recruiting, supervising, and retaining volunteer ombudsmen.

Section Referred to in Other Sections

This section is referred to in sections 1395i-3, 1396r, 3002, 3011, 3012, 3017, 3020e, 3021, 3024, 3025, 3026, 3028, 3029, 3030d, 3030e, 3030f, 3030g-11, 3030h, 3030i, 3030l, 3030m, 3030p, 3035a, 3035c, 3035o, 3057e, 3058d of this title.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CHURCH ON THE ROCK and PASTOR DON KIMBRO,

Plaintiffs,

v. **No. CIV 94-1101-JC/WWD**

CITY OF ALBUQUERQUE, and TONI MARTORELLI, in her official capacity as Director of Family and Community Services for the City of Albuquerque, and MARK SANCHEZ, in his official capacity as Deputy Director of Family and Community Services for the City of Albuquerque, and KATHLEEN STARK, in her official capacity as Supervisor, Bear Canyon Senior Center, City of Albuquerque,

Defendants.

AFFIDAVIT OF LORRAINE R. NUÑEZ
IN OPPOSITION TO MOTION
FOR PRELIMINARY INJUNCTION

COUNTY OF BERNALILLO)
) ss.
STATE OF NEW MEXICO)

COMES NOW the affiant, LORRAINE R. NUÑEZ, being first duly sworn upon her oath, deposes and states:

1. I am employed by the City of Albuquerque (the "City") in the position of Legal Secretary for the Legal Department.

2. I personally audio recorded and then transcribed the last approximately 5 minutes of the ***JESUS*** tape, a true and correct copy of which transcript is attached hereto and made a part hereof as Exhibit "A".

/s/ Lorraine R. Nuñez
LORRAINE R. NUÑEZ

SUBSCRIBED AND SWORN TO before me this 18th day of October, 1994, by LORRAINE R. NUÑEZ.

/s/ Janet L McCallister
Notary Public

My Commission Expires:

August 15, 1995

EXHIBIT "A"

TRANSCRIPT – LAST 5 MINUTES

The place where the body of the Lord Jesus was placed is empty. Three days after His crucifixion He rose from the dead. He is alive. He wants to come into your life. Jesus himself said "I am the resurrection and the life. He that believes in me though he were dead yet shall he live." Almost 2,000 years have past since Jesus rose from the dead and He still lives today as the greatest and most powerful influence in the world. The proud statesmen of the past centuries have come and gone. Rulers, scholars,

scientists, philosophers and theologians have come and gone, but Jesus still lives today.

He is the most unique person who has ever lived. His birth was unique. The Bible tells us He was born of the Virgin Mary. His life was unique. His life was characterized by the supernatural. He lived a holy life without sin and performed greater miracles than anyone who ever lived. His message was unique. He offers love, forgiveness, and a new way of life to all who receive Him as Savior and Lord. Wherever His message has gone, new life, new hope, and new purpose for living have resulted. His death on the cross was unique. Two thousand years ago, the God of the universe sent His only Son, Jesus Christ, to be the sacrifice for the sin of all men. He died for you. His resurrection was unique. Three days after His death the most amazing event in history took place, Jesus rose from the dead. His birth, His life, His death, and His resurrection, all prove that Jesus is exactly who He claimed to be, the Son of God, the Savior of all mankind.

This same Jesus Christ is alive today. He wants to come into your life, forgive your sins, and give you the power to live an abundant life. Listen to His words: "Come unto me all you that labor and are heavy laden and I will give you rest. I am the way, the truth and the life. No man cometh unto the Father but by Me." The Bible says, "for all have sinned and come short of the glory of God." It also says "for the wages of sin is death but the gift of God is eternal life through Jesus Christ our Lord."

When Jesus died He paid the penalty for your sin. Right now He stands ready to come into your life. "Behold, I

stand at the door and knock. If any man hear my voice and open the door, I will come into him." To experience His love and forgiveness and receive eternal life, you must receive Him as God's sacrifice for your sin and invite Him to come into your life by faith. If this is the desire of your heart you can pray a prayer of faith and Jesus Christ will come into your life. This is a suggested prayer, I will say it first:

> Lord, Jesus, I need you. Thank you for dying on the cross for my sins. I open the door of my life and receive you as my Savior and Lord. Take control of my life, make me the kind of person you want me to be. Amen.

If this prayer expresses the desire of your heart pray this prayer right now where you are, pray after me silently as I repeat it one phrase at a time:

> Lord, Jesus, I need you. –
>
> Thank you for dying on the cross for my sins. –
>
> I open the door of my life and receive you as my Savior and Lord. –
>
> Take control of life, make me the kind of person you want me to be. –
>
> Amen.

Now that you have prayed this prayer of faith and invited Jesus Christ to come into your life, you can be sure that He came in because He promised He would if only you would ask Him. You can also be sure that your sins are forgiven, that you are a child of God and have eternal life. If you want to experience the full and abundant life which Jesus promised, talk with Him every day in prayer. Discover His wonderful plan for your life by

reading the scriptures and meet with others who love and follow Him. Finally, remember always, His wonderful promises. "I will never leave you or forsake you. Lo, I am with you always even unto the end of the world."

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CHURCH ON THE ROCK and
PASTOR DON KIMBRO,

Plaintiffs,

v. **No. CIV 94-1101-JC/WWD**

CITY OF ALBUQUERQUE, and
TONI MARTORELLI, in her official capacity as Director of Family and Community Services for the City of Albuquerque, and MARK SANCHEZ, in his official capacity as Deputy Director of Family and Community Services for the City of Albuquerque, and KATHLEEN STARK, in her official capacity as Supervisor, Bear Canyon Senior Center, City of Albuquerque,
Defendants.

AFFIDAVIT OF KIM H. PERDUE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

COUNTY OF BERNALLILO)
) ss.
STATE OF NEW MEXICO)

COMES NOW the affiant, KIM H. PERDUE, being first duly sworn upon his oath, deposes and states:

1. I am employed by the City of Albuquerque (the "City") in the position of Senior Center Network Manager in the Department of Senior Affairs. I have held this position for about 15 years, and my general duties encompass the management and control of the City's six senior centers and the programs that are run from those facilities, among them being the Bear Canyon Senior Center.

2. Contrary to the facts stated in Paragraph 4 of the Affidavit of Pastor Don Kimbro in Support of Motion for Preliminary Injunction, the City does *not* on a "space available basis" allow the Bear Canyon Senior Center – or any senior center – "to be used by members of the general public for the showing of films, lectures, various programs, and discussions on an unfettered range of subjects." The City, as demonstrated hereinbelow, has numerous restrictions on use of senior centers that are designed to ensure that the centers are kept for the benefit of and be appropriate for senior citizens.

3. The City prohibits use of any of the senior centers "for sectarian instruction or as a place of religious worship". (See Section 6, Paragraph I.G. – "Facilities" – of Senior Center Policy and Procedures Manual, a true and correct copy of which is attached hereto as Exhibit "A" and incorporated herein by reference). This policy was prepared and implemented in accordance with, and as a reflection of, the Older Americans Act, 42 U.S.C.A. 3027(a) (14) (A) (iv), which provides in pertinent part that as a condition of receiving federal grant monies for senior centers each State must give assurances that a senior center "will not be used and is not intended to be used

for sectarian instruction or as a place for religious worship." The City has received federal monies in the acquisition, alteration or renovation of a number of its senior centers.

4. Moreover, City policy requires that use of senior centers be restricted to "usage by center members, senior citizen organizations, or organizations composed of at least 75% senior citizen membership (55 years or older)." (Exhibit "A", Section 6, Paragraph 1.B.) The City does not allow use of any senior center by members of the general public who do not meet these restriction, except for occasional meetings by City departments or groups meeting to discuss issues specific to senior citizens (See Para. 7 hereinbelow).

5. Moreover, in addition to the prohibition against use for sectarian or religious purposes, and the rule that users meet the 75% senior citizen requirement, the City prohibits use of senior centers by for-profit businesses, except for limited and controlled advertising practices. (See Exhibit "A", Section 6, "Facilities", Paragraph 1.E.)

6. Moreover, in addition to the other restrictions on use of senior centers identified above, the City restricts the use of such facilities for political purposes. In particular, City policy prohibits speeches by single candidates, and restricts the distribution of campaign literature. (See Section I, Paragraph 6 – "General Guidelines" – Office of Senior Affairs Policy and Procedure Manual, a true and correct copy of which is attached hereto as Exhibit "B" and incorporated herein by reference.)

7. The City further restricts use of senior centers by outside groups by requiring that such groups be

approved by the center director, and that groups be comprised of 75 percent senior citizens or be "for the express purpose of studying or discussing senior citizen issues". (Exhibit "C", Section XI, "General Guidelines for Facilities") In addition, the Older Americans Act requires that members be involved in determining the programs that are offered at each facility, and the City implements this policy.

8. The purpose of senior centers, including the Bear Canyon Senior Center, is not to promote expression, but rather, as stated at 42 U.S.C.A. Section 3002(35), to provide a variety of "services" to senior citizens, including recreation, health and fitness, nutritional needs, referral to senior citizen service providers, health assessment and screening, education, shopping assistance, and tax preparation assistance.

9. The City has never had a policy or practice of opening its senior centers, including the Bear Canyon Senior Center, for discourse by the public at large on an unrestricted basis.

10. Senior centers, including the Bear Canyon Senior Center, are not intended for the purpose of solicitation or religious proselytizing. In fact, the practices of selling products or recruiting members, including religious proselytizing, are inconsistent with the intended use of such centers – and are prohibited – because such practices tend to target an often frail and vulnerable audience and because they are contrary to the intended purpose of senior centers, which is to provide a largely self-governing haven for recreation, services and socializing by senior citizens.

11. The City policy against use of the Bear Canyon Senior Center by religious groups is consistently enforced through programmatic oversight against all persons, regardless of religious denomination, belief or creed.

12. In addition to the reasons stated hereinabove, the City has denied use of the Bear Canyon Senior Center to show the *Jesus* film and to distribute Bibles because it would constitute a violation of 42 U.S.C.A. Section 3027, and because it would result in opening the door to unrestricted religious and nonreligious solicitation at senior centers, and cause unmanageable competition and clamor among religious, political and for-profit business for limited senior center space in order to gain the captive ear of senior citizens. The result would be to alter the character of such facilities.

13. On May 18, 1994, the City offered to permit the Church on the Rock to use of one of its multi-service centers, which are open to the general public, to show the *Jesus* film. (See Exhibit "8" to Affidavit of Pastor Don Kimbro). The Church on the Rock did not respond to that offer.

/s/ Kim H. Perdue
KIM H. PERDUE

SUBSCRIBED AND SWORN TO before me this 18th day of October, 1994, by KIM H. PERDUE.

/s/ Janet L. McCallister
Notary Public

My Commission Expires:

August 15, 1995

Exhibit "A"

SECTION 6

FACILITIES

All facilities are to be maintained so as to provide for health, safety, and comfort of senior citizen participants during conduction of programs. Responsible for the facility is the Senior Center Director or his/her designated representative. The facility includes the building designed for senior center activities, the grounds it is situated on, the equipment used for programming, and for maintenance and upkeep.

Building

1. Operation and Usage

   A. The facility will be made available for programs based on budgetary limitations.

   B. The facility will be made available for usage by center members, senior citizen organizations, or organizations composed of at least 75% senior citizen membership (55 years or older).

      1. During the off hours of the center programs, the facility is available for usage provided an amount offsetting the cost of staffing the event is paid.

      2. Rental written agreements with relevant parties will state hours to be used, responsibility for maintenance and repairs, equipment usage, cost of event, security of building, liability, and insurance.

   C. Smoking permitted in designated smoking rooms only.

D. No gambling is allowed in the facilities as per city ordinance and state statutes.

E. Advertising for profit of a private company or business can be conducted in the following manner:

1. Through the senior centers newsletter where cash is handled by Advisory Council members and all proceeds go to the council or,

2. Sponsoring a function by purchasing food items, supplies, and/or entertainment for an event. The company can then post a sign with their name and phone number and have literature or trinkets available (during the event) for people to pick up.

F. It is prohibited to use any Office of Senior Affairs staff, equipment, food, facilities, or vans to cater private parties and non-OSA functions.

G. It is prohibited to use any OSA facility for sectarian instruction or as a place for religious workship [sic].

2. Maintenance

A. Interior

1. A daily check of all tables and chairs will be made by staff personnel as they are used, and needed repairs be immediately referred to the facility director.

2. Furnishings will be attractive, comfortable, safe and suitable for participants with mobility and visual limitations.

3. The city's Building Maintenance Division will be contacted before season use of heating or cooling units.

    a) Inspection of units should be made periodically for adequate quiet heating, cooling, and ventilation systems.

4. Provisions for past control shall be made a minimum of once a month.

9. Floors and carpets shall be cleaned immediately upon report of spillage for health and safety reasons.

6. In order to provide adequate lighting, fixtures will be checked periodically.

7. Restrooms will be cleaned, checked for repairs, and maintained with proper supplies daily.

8. The facilities will be closed one week every six months for renovations, painting, and cleaning.

9. Ingress and Egress for handicapped shall always be accessible and movement within the facility will be barrier free in conformance with a city ordinance.

B. Exterior

1. The building shall be constantly maintained to provide an attractive appearance.

2. Identification signs and lettering on building shall be in good repair to make clear the purpose of the facility.

3. Roof leakage shall be repaired immediately in order to prevent damage in the interior.

4. Lighting shall be constantly maintained for visual protection of the building.

3. Safety

A. Fire Safety

1. Periodic firedrills will be conducted on a quarterly basis.

2. Smoke detectors will be checked for proper functioning semi-annually.

3. Fire extinguishers will be provided as required by City fire code.

4. Arrangements will be made with the Fire Dept. for required inspections.

5. Fire Department regulations will be posted and complied regarding maximum number of people allowed at a function.

6. Combustible materials will be stored according to Fire Dept. regulations.

B. Participant Safety

1. First Aid Kits will be kept in the staff office and restocked as necessary.

2. Handrails will be provided in all lavatories.

3. Floors will be maintained with non-skid supplies.

4. Handles and latches will be checked for proper functioning and replaced as necessary.

5. Hallways will be barrier free and well lighted.

Grounds

1. Maintenance

   A. It is the responsibility of the facility director to see that the grounds, parking lots and irrigation systems shall be maintained according to the contract between OSA and the Parks and Recreation Department.

   B. Handicapped parking will be provided according to City Ordinance R-40 Sec. 40.E. (2%).

   C. Ingress and egress will always be accessible for emergency vehicles.

   D. All roads, paths, sidewalks, etc. will be repaired immediately as needed.

   E. The facility director is responsible for arranging for refuse containers and for refuse removal.

   F. Air conditioning and heating units will be checked by Building Maintenance before the season starts.

2. Safety

   A. Snow and/or ice removal from all roads, paths, sidewalks and parking lots shall be done immediately.

   B. The parking lot will be sufficiently illuminated.

   C. Arrangement for police surveillance will be on a daily basis.

Equipment

All equipment will be described and serial numbers noted on Inventory cards. One copy to go to fiscal accounting and one retained at the center where the equipment is located.

Building

1. Kitchen

   A. Ovens will be cleaned daily so that they may always be sanitary for cooking.

   B. Freezers and refrigerators will be checked daily for proper functioning so there will not be any food loss.

   C. Icemakers will be checked daily so that seniors will be assured of having cool drinks.

   D. All coffeepots, urns, pans, dishes, glasses, meat cutters, grinders, cups, utensils, knives, etc., will be cleaned immediately after being used so that they may be kept in a sanitary condition.

2. Classrooms

   A. Woodshop

      1. All equipment will be unplugged from electric socket when not in use and cleaned after each usage.

   B. Sewing

      1. All machines will be put away in cases and stored away in a secured area.

   C. Ceramics

      1. All molds are to be put away in a secured area.

      2. All kilns are to be a safe distance from walls or combustible areas for safety precautions.

      3. All kilns will be turned off before the last employee leaves for the day.

D. Lapidary

1. All lapidary equipment will be cleaned after each days use. All paper and trash will be properly disposed of.

3. Pool Rooms

A. All tables will be cleaned on a daily basis.

B. Cue sticks will be in racks at all times except when in use.

4. Maintenance Room

A. Vacuum cleaners will be secured in safe areas when not in use.

B. All tools and equipment provided for the handiman are to be locked in a storage room when not in use.

5. Ad Boards

A. All ads are to be posted and removed by *CENTER STAFF ONLY*.

Leave completed ad forms at the front desk for posting. If you are interested in a posted ad, please copy the information on a separate piece of paper (available at desk).

B. All ads must be written or typed on the form shown below (See Appendix 6.1).

C. Ads will be left on the board for 30 days. A new form must be filled out after that time.

D. Please give complete information on your ad, including your phone number.

E. The ad board is intended for the personal, non-commercial use of the participants of the center, City of Albuquerque policy prohibits our

providing space for commercial purposes (see page 1, 1.E).

F. Space on the ad board is provided as a public service. Final authority on the approval or denial of ads rests with the center staff.

G. Ads are posted without any implied or intended endorsement of the goods, services or persons advertised. Neither the center nor the City of Albuquerque assume any responsibility for items posted.

Grounds

1. Vehicles

A. All vans, buses, trucks, etc., are to be parked in secured areas whenever possible. If this is not feasible, they are to be parked in a well lighted area where they are visible to the public. All doors and latches will be locked whenever the vehicles are not in use. Vans may not be used for personal use. They are not to be parked or taken home for the evening.

B. All vehicles are on a preventive maintenance program that the City's Fleet Management Division has instituted. All managers will comply with instructions from Fleet Management.

C. All vehicles are to be checked by drivers each time they are used. Any discrepancies noticed should be reported to their supervisors immediately. Managers will then take the action necessary for repairs to make the vehicle safe and useable.

D. All vehicles will have a first aid kit.

Exhibit "B"

OFFICE OF SENIOR AFFAIRS POLICY AND PROCEDURE MANUAL

MAY 4, 1993

Section I

GENERAL GUIDELINES

All OSA staff must abide by all OSA Policy and Procedures, City of Albuquerque Personnel Regulations and Procedures, contracts with "B" and "C" series collective bargaining units, Employee Code of Conduct, and City Ethics Handbook, and OSA Safety Manual.

Staff, especially newly hired, are required to read and become familiar with the contents of these documents.

1. CHAIN OF COMMAND

In the absence of the OSA Manager, the following persons are authorized to administer:

Social Services Manager

Senior Centers Network Coordinator

Nutrition Manager

Designated M-Series staff persons

2. SIGNATURE AUTHORITY

All contracts and agreements must be reviewed by the OSA Manager and can only be signed by the Department Head. The OSA Manager will review all transmittals to CAO, Mayor, City Council, Department Heads, and other governmental bodies and agencies before sending them to Department Head.

3. STAFF MEETINGS

OSA administrative staff meetings will be held monthly. Each section shall have individual staff meetings at least once a month.

4. TRAVEL – OUT-OF-CITY

A P-30 requesting City business must be submitted for all non-overnight and out-of-city travel, and must be approved in advance. All out-of-city trips must be OSA related.

When OSA M-Series exempt employees are requested to represent OSA at out-of-town professional conferences and meetings, or are serving as a group escort outside the City, they will not be allowed compensatory time hours over and above their regular work schedule.

5. TRAVEL – LOCAL MILEAGE REIMBURSEMENT

When employees are requesting reimbursement for local mileage, they must record the address of the destination point when the destination point is not a wellknown address, such as City Hall, a senior center, etc. If there is not enough room on the mileage form to record addresses, use a separate piece of paper and attach to mileage form. Time must be recorded.

The miles traveled must be as exact as possible. Utilize the odometer to record the mileage when leaving and returning. If errors are found, mileage request will be returned to employee. *No mileage is allowed to or from home. No mileage is allowed for non-City business.*

6. VISITS BY POLITICAL CANDIDATES

When political candidates arrive at OSA-operated facilities, they shall be allowed to speak to participants on a one-to-one basis to explain their positions and answer questions. At no time should candidates be allowed to make speeches unless all candidates running for that particular office have been invited to make presentations. If possible, program supervisors may explain the programs available at the facility and introduce the candidates to the staff. Staff persons are forbidden to ask other staff or participants to support any candidate during working hours.

Pamphlets cannot be placed on countertops or other furniture in OSA facilities.

7. PROFESSIONAL ORGANIZATION PARTICIPATION

Membership in any civic or professional organization is left to the discretion of each employee. Employees must get the Manager's written approval prior to using City time to attend any meeting.

Absolutely no employee is to use OSA facilities, office equipment, supplies or staff to perform any functions for outside organizations, unless prior written permission is acquired from the Manager.

8. PRIOR APPROVAL OF CONFERENCE WORKSHOP

Any staff submitting workshop proposals for out-of-state conferences must request approval to do so from their manager.

9. EATING OF MEALS

No meals are to be eaten on City time. No staff breakfast will be served after 8:00 am.

10. CITY VEHICLE USAGE POLICY

The use of City vehicles must comply with Administrative Instruction No. 120 dated August 22, 1990.

11. OVERTIME/COMPENSATION TIME

Non-exempt union contract employees are eligible to receive compensatory time as per contracts. Regular work schedules may be altered during the same work week, if written notification is given to the employee at least 24 hours in advance.

Exempt employees are expected to work as many hours as necessary to complete their responsibilities.

A request to use comp time for non-exempt employees must be approved in advance by the immediate supervisor.

12. REST PERIODS

All employees are entitled to rest periods per Personnel Rules and Regulations. Lunch breaks are usually one hour and coffee breaks (one in the first half of the day and one in the second half) are fifteen minutes. Lunch may be eaten in the cafeteria or

conference room. Refer to "B" and "C" series union contract for additional information.

13. TIME CLOCK PROCEDURES

The Fair Labor Standards Act mandates the hours that non-exempt employees work.

All Fair Labor Standards Act non-exempt full-time, B and C series employees and part-time employees must use the time clock or time sheet when arriving in the morning, leaving for lunch, returning from lunch and leaving at the end of the day. Exempt employees are not to use the time clock and must use City mandated form. M Series non-exempt will use time sheets.

Those employees who are out in the field and cannot use the clock for lunch or other times, must make a notation on their time card when arriving at the office, explaining the time they worked. Managers must initial the time card when a written notation is made on it.

Non-exempt employees may not work more than 40 hours per week without written permission from their supervisor.

Employees must clock in on time. Any late recording could result in employees being docked proportionately in 15 minute intervals.

All managers will monitor time clocks and use time cards for payroll purposes.

Time cards will be stored for a period of two years by the Fiscal Office.

If you do not know whether your [sic] are an exempt or non-exempt employee, please contact your supervisor or the OSA administrative secretary.

14. PENALIZED TIME

When an employee's work hours are docked, the City Personnel Policies and Procedures must be complied with.

15. INCLEMENT WEATHER AND NATURAL DISASTER

During periods of inclement weather or incidents of natural disaster, Office of Senior Affairs facilities and programs will remain open until otherwise notified by the Mayor's Office. The Office of Senior Affairs chain-of-command will be used to disseminate this information. An exception to this is any program or activity requiring the provision of transportation for participants. In this case, program managers are to determine if driving conditions are hazardous. Prior to the cancellation of any activity, the program manager must notify his/her supervisor. Radio stations should be notified that the activity has been cancelled.

Employees unable to reach work due to inclement weather must notify their immediate supervisor within 15 minutes of their reporting time. Vacation must be requested for time missed. Should there be no vacation available to the employee, he will be given leave without pay.

16. SICK LEAVE AND PAYROLL CODINGS

There are three payroll timesheet codes to use:

11-4 for employee's personal illness or any ordinary doctor's appointment

11-W for employee's outpatient surgery, hospitalization, serious illness, "maternity" disability, etc.

11-X for illness, hospitalization, death, etc., in employee's family

Sick leave hours recorded on P-30's should be consistent with timesheet codings.

17. INTERVIEW AND SELECTION PROCEDURE

The interview and selection procedure is defined with the March 31, 1989 and October 30, 1990 memos from the Department of Community Services Director. The circularization, interview process and selection process for all positions must comply with these memos.

18. QUESTIONNAIRES FOR JOB INTERVIEWS POLICY

Any questionnaire developed to interview applicants must be job related and have the prior approval of the OSA Manager.

19. OFFERS OF EMPLOYMENT

Pursuant to Administrative Instruction No. 125, all applicants for City employment will be required to submit to and pass an employment medical examination and an alcohol/drug screening.

Medical examination and alcohol/drug screening may only be conducted after a conditional offer of employment has been made. Departments are responsible for notifying successful applicants for employment that offers of employment are conditional on the passing of the medical examination and the drug/alcohol screening.

20. C.P.R. AND FIRST AID

Each OSA staff person working with seniors is required to complete a Cardio Pulmonary Resuscitation (C.P.R.) and First Aid course. This certification must be kept current.

21. EMPLOYMENT OUTSIDE THE CITY/SUPPLEMENTAL EMPLOYMENT

Prior department and CAO permission is required for any employment outside the City.

22. PERFORMANCE EVALUATIONS

MANAGEMENT AND PARA-PROFESSIONALS

All permanent and probationary management and para-professional employees will undergo a performance evaluation interview twice yearly as outlined in the Performance Evaluation Manual.

All new employees hired into management and para-professional series positions must undergo a Performance Evaluation Job Criteria and Objective setting interview the first week on the job. A copy will be sent to Personnel within five working days.

A performance evaluation will be conducted based on an employee's anniversary date of hire (ADOH) with the City. Interviews will be conducted six months after the ADOH. The second interview will take place six months after the adjustment and review session has been completed.

If an employee is transferred or promoted to a new management or para-professional series position, it will be his/her former supervisor's

responsibility to conduct an "Exit Interview" performance evaluation and submit ratings on the employee.

"B" AND "C" SERIES EVALUATIONS

Performance evaluations must be conducted at least two weeks prior to each employee's anniversary date. A form will be issued from Personnel.

PART TIME EMPLOYEES

All part time employees who have worked four months or longer will be evaluated every June.

23. DISCIPLINE

All disciplinary procedures must comply with City Personnel rules and regulations Sec. 900.

Exhibit "C"

OFFICE OF SENIOR AFFAIRS

POLICY AND PROCEDURE

MANUAL

MAY 4, 1993

* * *

Section XI

GENERAL GUIDELINES FOR FACILITIES

Operations

Staff located at each facility shall have full responsibility for operation and maintenance of center facilities, grounds and equipment. Only OSA staff members may open, operate, or close the facility.

Use by Outside Groups

Requests for facility space must be approved by the facility director and requested in advance.

Use of OSA operated facilities on a space available basis by groups shall fall into the following categories:

1. Groups composed of 75% or more senior citizens; or
2. Groups meeting for the express purpose of studying or discussing senior citizen issues.
3. City Policy Maker and Departments Heads. Administrative staff should be notified and respond to requests for space made by City policy makers.

When a space in a facility is provided to outside groups, there shall be a written agreement with all relevant parties concerning time of use, maintenance and repairs, equipment use, security and safety, and reimbursement for overhead costs whenever appropriate.

Wallspace/Bulletin Boards

All program related posters and bulletins must be screened and initialed by the program director or his/her designee prior to being placed on any center bulletin board. In addition to initialing the item, an expiration date should be placed in the lower righthand corner and removed on that date. All other posters must be screened and initialed by the facility director or his designee. Only information beneficial to senior citizens is to be placed on bulletin boards. No information for political issues or candidates and for-profit organization is allowed in OSA facilities. Should the facility director have any questions regarding the validity of any request, he/she is to investigate it thoroughly before putting it up in the center. If any question still remains, call the OSA administrative staff for assistance.

Supreme Court, U.S.
FILED
SEP 17 1996
CLERK

No. 96-286

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CITY OF ALBUQUERQUE, and TONI MARTORELLI, in her official capacity as Director of Family and Community Services for the City of Albuquerque, and MARK SANCHEZ, in his official capacity as Deputy Director of Family and Community Service for the City of Albuquerque, and KATHLEEN STARK, in her official capacity as Supervisor, Bear Canyon Senior Center, City of Albuquerque,
Petitioners,

v.

CHURCH ON THE ROCK and PASTOR DON KIMBRO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment is violated by a city policy that otherwise permits citizens to engage in expression at Senior Centers about the Bible, Jesus Christ, and related matters, but excludes such speech when it is presented from a religious point of view?

PARTIES

The caption of the case contains the names of all parties. There are no parent companies or nonwholly owned subsidiaries.

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No. 96-286

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SUPREME COURT OF THE UNITED STATES

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CITY OF ALBUQUERQUE, and TONI MARTORELLI, in her official capacity as Director of Family and Community Services for the City of Albuquerque, and MARK SANCHEZ, in his official capacity as Deputy Director of Family and Community Service for the City of Albuquerque, and KATHLEEN STARK, in her official capacity as Supervisor, Bear Canyon Senior Center, City of Albuquerque,
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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

1. The City of Albuquerque enforces the policy at issue as a total ban on all religious expression by private citizens on the premises of government-owned Senior Centers. The policy allows expression at the facilities, including lectures and films presented by private citizens, on any subject matter that is "of

interest to senior citizens," including expression on religion, the Bible, and related matters. Expression on these topics is excluded, however, when it is presented from a religious perspective. While the policy facially bans "sectarian instruction" and "religious worship," in practice, City officials enforce it as a total ban on all religious sentiments. See Pet. App. 78a (policy).

Under the policy, it is permissible for Don Kimbro, a pastor at Church on the Rock and Senior Center member, to show a film and express sentiments on the Bible and Jesus Christ from a secular or skeptical perspective. The City prohibited his showing the film *JESUS*, however, because the film presents Jesus from a religious viewpoint. It is within this context that Kimbro and the Church challenged the policy as unconstitutional viewpoint and content-based discrimination violative of the First Amendment.

2. On March 24, 1994, Kimbro requested permission to show a two-hour film entitled *JESUS* at one of the Centers. He also requested permission to give away large print Bibles to those who attended the film presentation. Aplt. App. at 103.[1] He enclosed a copy of the film with his letter for the City to review. Aplt. App. at 49.

After reviewing the film, the City denied Kimbro's application. The City stated that allowing the *JESUS* film to be shown would violate City policy prohibiting "sectarian instruction" and "religious worship" at the Centers. Aplt. App. at 105. The City was also motivated by its concern that allowing the film to be

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[1]References to the Appellants' Appendix, filed in the United States Court of Appeals for the Tenth Circuit are indicated as "Aplt. App.".

shown would offend some of the Senior Center members.[2] Aplt. App. at 923-24, 927.

On September 27, 1994, Kimbro filed his complaint against the City, challenging the constitutionality of the policy, and seeking injunctive and declaratory relief. Aplt. App. at 1. On October 3, 1994, Kimbro moved for a preliminary injunction against the City on the grounds, *inter alia*, that the policy of excluding all religious expression at the facilities was unconstitutional. The district court heard evidence and argument in support of, and in opposition to, the constitutionality of the policy at hearings on December 5 and 16, 1994. With the consent of the parties, the court converted the proceeding into cross motions for summary judgment. Aplt. App. at 1417-24. At the conclusion of the December 16th hearing, the district court rejected Kimbro's claims and granted complete summary judgment in favor of the City. Pet. App. 15a, 17a.

3. In a unanimous decision, the United States Court of Appeals for the Tenth Circuit reversed. Pet. App. 1a-14a. The Court relied on *Rosenberger v. University of Virginia*, 515 U.S. ___, 115 S.Ct. 2510, 2516 (1995), *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), *Widmar v. Vincent*, 454 U.S. 263 (1981), and other decisions of this Court in a straight forward application of the public forum doctrine. Because the Centers had "been opened to the public for discussive

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[2]This alone renders the City's censorship of the film unconstitutional. Expression may not be restricted by the government on the basis that some may find it offensive, since to do so constitutes unconstitutional content-based regulation. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Texas v. Johnson*, 491 U.S. 397, 411-12 (1989); *Boos v. Barry*, 485 U.S. 312, 321 (1988).

purposes [including] lectures and classes on a broad range of subjects by both members and non-members" alike, the court of appeals held the facilities to be designated public fora. Pet. App. 7a-8a. The court found that the forum was loosely restricted on the basis of age, and that the "subject matter of presentations" was broadly limited to "topics 'of interest to senior citizens'." Pet. App. at 8a. The court found that the City had "opened the doors of its Senior Centers" to presentations about religion and the Bible, and related topics. Pet. App. at 9a. The court found that the film *JESUS* dealt with subject matter that was a permitted topic of presentation at the Centers. Pet. App. at 9a. The court further found that the film was excluded because its perspective "advocat[ed] the adoption of the Christian faith," rather than presenting the topic from a "skeptical" or secular viewpoint. Pet. App. at 9a. The court concluded that the policy was "properly analyzed as a viewpoint-based restriction on speech." Pet. App. at 9a.

The court observed that "[v]iewpoint discrimination is 'an egregious form of content discrimination'" and "subject to strict scrutiny," citing *Rosenberger*, 115 S.Ct. at 2516, *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990), and *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983). Pet. App. at 10a. The court then found that "to survive strict scrutiny, the City's policy must be 'narrowly drawn to effectuate a compelling state interest'," citing *Perry*, 460 U.S. at 46. Pet. App. at 11a.

The court below then rejected the justifications in support of the policy offered by the City. First, the court held that the Establishment Clause did not justify or require the exclusion of the film. Citing *Rosenberger*, 115 S.Ct. at 2520-25, *Lamb's Chapel*, 508 U.S. at 394-95, and *Widmar*, 454 U.S. at 270-75, the court reasoned "that providing equal access to a designated public forum for citizens engaging in religious expression and citizens engaging

in secular expression does not violate the Establishment Clause." Pet. App. at 11a. Therefore, the "restriction [was] not necessary to serve [that] interest." Pet. App. at 11a. Second, the court dealt with the City's argument that the Older Americans Act requires exclusion of "sectarian worship" and "sectarian instruction" as a condition for receiving federal funding. Pet. App. at 12a. The court held that simply because the policy was facially designed to "conform with federal statutory requirements . . . does not shelter it from constitutional scrutiny." Pet. App. at 12a. The court held that compliance with the "act does not justify this viewpoint-based restriction on expression." Pet. App. at 12a. Third, the court rejected the City's justification that the policy was necessary to protect senior citizens "'vulnerable' to 'religious proselytizing and coercion'." Pet. App. at 12a. The court found that senior citizens are not, as a class, in need of "special insulation from invitations to adopt a religious faith," especially when attendance "is purely voluntary." Pet. App. at 13a. Finally, the court rejected the City's argument that *Tilton v. Richardson*, 403 U.S. 672 (1971), supported exclusion of religious expression at the Centers. Pet. App. at 13a. The court stressed that *Tilton* "concerned an Establishment Clause challenge to statutory language similar to that in the Older Americans Act." Pet. App. at 13a. The court observed that *Tilton* was not a "free-speech challenge to the act" and nothing in that case suggested otherwise. Pet. App. at 14a. The court noted that the City's argument under *Tilton* had already been rejected by this Court in *Widmar*, 454 U.S. at 272 n.12. Pet. App. at 14a.

4. On July 1, 1996, the court of appeals denied the City's motion for stay of the mandate pending filing of a petition for writ of certiorari.

5. On July 18, 1996, Justice Breyer likewise denied the City's application to stay the mandate pending the filing and

disposition of a petition for a writ of certiorari.

6. This case does not involve a challenge to the Older Americans Act, 42 U.S.C. § 3027(a)(14)(A)(IV) (1988), nor does it involve a challenge to the ability of the federal government to condition the receipt of federal funds on compliance with the First Amendment's Establishment Clause. Indeed, contrary to the suggestion of the instant petition, such challenges were not raised below, and are not a part of the record of this case. Thus, the purported question presented by Petitioners does not arise from the record or decision below, and is improperly raised before this Court.

7. The City has also misstated the fact record below. The Albuquerque Senior Centers are multipurpose facilities that are open to all members of the public who are 55 years of age or older, and their spouses regardless of age. Aplt. App. at 48, 542, 861-62. Members and nonmembers alike are permitted on the premises to lead classes, give lectures, and exhibit films. Aplt. App. at 887. Nonmembers who teach classes need not be over 55 years of age. Aplt. App. at 887. Pastor Kimbro is over 55 years of age and is a member of the Senior Centers. Aplt. App. at 206, 208. He would be eligible to exhibit a film or lead a class, however, even if he were not a member. Aplt. App. at 887.

The only subject matter or topic limitation for classes, lectures, or films at the Centers is that a topic should be "of interest to senior citizens." Aplt. App. at 863, 885-89. The City allows the presentation of lectures, classes, and films on the topic of religion, the Bible, and even Jesus Christ. Aplt. App. at 337, 662, 837, 839. For instance, the Senior Centers have permitted the following classes and lectures led by private citizens:

- Bible as Literature - "Study the Bible as literature and see video tapes of Holy Lands." Aplt. App. at 337.

- New Testament Bible Study - "This . . . class will cover the Book of Mark. . . . A New Testament, any version, will be needed for the class, although the New American Standard Bible is preferred." Aplt. App. at 662.

- Theosophy - "This is a discussion group that converses on the subject of the philosophy of religions." Aplt. App. at 482.

- Metaphysical Discussion Group - "[O]pen, honest and creative sharing with a special focus on celebrating all the different ways in which we see our world." Aplt. App. at 176.

- Myths and Stories about the Millennium (presents theories and myths from the Bible, and Greeks, and Romans, "surrounding the end of the age")

- How to Die Young at the Oldest Possible Age (teaches elevating self-esteem)

- El Marrano - History of the Crypto-Jew (history of Spanish and Portuguese Jews forced to convert to Christianity)

- The Near Death Experience (discusses how people experiencing near-death have a renewed sense of hope)

- Make Christmas Merry (teaches how to get through the holidays without being "spiritually" and "emotionally" spent)

- Life Counseling (private professional counselor teaches how to "cope")

- Life Review Class (leader discusses "universal life themes for deepening awareness of self")
- Managing the Stress in Your Life
- Healing Thy Self (overcoming guilt and increasing optimism)
- Meditation and Dream Analysis (teaches meditation and dream interpretation)
- Positive Attitude Class ("Reverend Alan R. Stanley" presents class on having positive attitude about life and death)
- Our Primal Feelings: How They Can Help Us to Survive and Flourish in Today's World (learning how to handle stress by focusing on "childhood traumas")
- Psychological Development through Autobiography (teaches how to "review and integrate the experiences of life")
- Holistic Nursing Service (teaches relaxation and guided imagery to prevent "anxiety, spiritual distress")
- Gentle Yoga (teaches managing stress by using mind and body)
- Tai Chi Chih (teaches "stress reduction" and "heightened spiritual awareness")
- Passover Commemoration (presentation commemorating the Passover story)

- Meditation (Listening to Inner Self) (teaches meditation to quiet "anxieties, concerns, worries")
- Bridge
- Ceramics
- China Painting
- Conversational Chinese
- Creative Writing
- Crocheting
- Legal Clinic (private attorney answers questions)
- Lip Reading
- Literary Discussion
- Bingo
- Square Dancing
- Aquatic Aerobics
- Afternoon at the Movies (films are shown)

See Aplt. App. at 334-716 (Senior Center Activity Catalogs). The City permits the exhibition of films by outside nonmembers on a regular basis. Aplt. App. at 449, 452, 527, 863, 907. Also, those who lecture are permitted to distribute literature. Aplt. App. 176, 901.

As noted above, the only relevant topical, content or subject-matter restriction with respect to expression at the Centers is contained in the policy held unconstitutional by the court of appeals.[3] Facially, the City's written policy prohibits "sectarian instruction" and "religious worship." By practice, the City enforces the policy to prohibit the presentation of permitted topics from a "religious" point of view. Aplt. App. at 98, 837-39, 877-83, 900-01, 923-25, 927, 929-30. So, for example, a lecture on the Bible must present it as history or literature, and not as Scripture, Aplt. App. at 837, 839, and a presentation about Jesus must present him strictly as a historical figure, Aplt. App. at 837.

The City enforces its policy against all citizens at the Senior Centers, Aplt. App. at 875, not merely against lecturers or speakers in the presentation rooms:

- Because the City views such explanations as "sectarian instruction," Aplt. App. at 875, the City employees have warned citizens to stop discussing their faith in conversation while on the premises of the Centers. Aplt. App. at 875-77.

- Because the City views such conduct as "religious worship[,]" the City employees have admonished citizens not to say an audible "grace over [a] meal." Aplt. App. at 880.

- The City interprets its policy as a ban on Catholics holding prayer beads and saying audible Rosaries aloud while at the Centers. Aplt. App. at 881.

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[3]There are some restrictions, not at issue in this litigation, on political candidates and on "advertising for profit." Aplt. App. at 125, 140.

- Because the City views such conduct as "religious worship," the City bans citizens from reading the Bible aloud to other persons on the premises. Aplt. App. at 881.

- Although the City does not ban listening to secular music at the Centers, it does ban listening to the "Sermon on the Mount" when the listener's "viewpoint" is religious. Aplt. App. at 930.

The record below amply demonstrates, as these excerpts indicate, that the City interprets and enforces its policy as a total ban on private "religious" expression at the Senior Centers.

ARGUMENT

The court of appeals correctly applied principles that are firmly established by this Court's cases. The decision below does not, as erroneously contended by the City, "raise important questions of federal constitutional law as to the power of Congress to enforce the Establishment Clause as a condition upon the expenditure of federal funds." Pet. at 8. Indeed, this has never been an issue in this case. Further review is, therefore, unwarranted.

The court of appeals decision represents a straight forward application of principles that are well settled under this Court's decisions in *Rosenberger*, 115 S.Ct. 2510, *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. ___, 115 S.Ct. 2440 (1995), *Lamb's Chapel*, 508 U.S. 384, *Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990), *Widmar*, 454 U.S. 263, and numerous other cases. The City, however, attempts to manufacture a new issue that was not raised below, and does not, in fact, exist in this case. Further, in attempting to create an

issue for review where there is none, the City has badly misstated the holding and analysis of the decision below.

I. THE CITY RAISES AN ISSUE THAT WAS NOT PRESENTED OR PRESERVED BELOW, AND IS NOT PROPERLY BEFORE THIS COURT. THIS CASE DOES NOT PRESENT AN IMPORTANT AND UNRESOLVED FEDERAL QUESTION.

This case involves a straight forward challenge to a City policy banning the religious expression of all citizens on the premises of Albuquerque Senior Centers. It does not involve a challenge to the federal Older Americans Act. To be sure, in the court below, the City attempted to justify the policy by arguing that the Act required the City to exclude religious speech as a condition on the receipt of federal funding. The Respondents have never contended, however, that the federal government cannot condition the receipt of funding upon compliance with the Establishment Clause. If the Act's prohibition on "sectarian instruction" and "religious worship" is construed as coextensive with the requirements of the Establishment Clause, then it may well pass muster. But such a construction of the City's policy could not save it because the policy restricts expression well beyond the requirements of the Establishment Clause.

A total ban on the religious expression of *citizens* under the policy is neither mandated by the Establishment Clause or tolerated by the Free Speech Clause. There is simply no authority for the proposition that the Establishment Clause requires the censorship of *all* religious expression of citizens at any government facility, let alone Senior Centers. On the contrary, this Court has been quite clear that, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free

Exercise Clauses protect." *Mergens*, 496 U.S. at 250. Similarly see, *Rosenberger*, 115 S.Ct. at 2522; *Pinette*, 115 S.Ct. at 2448.

This Court has also been quite clear that providing private citizens equal access for religious expression in a designated public forum, or even in a nonpublic forum, does not violate the Establishment Clause, as claimed by the City. See *Rosenberger*, 115 S.Ct. at 2521-23; *Lamb's Chapel*, 508 U.S. at 395; *Widmar*, 454 U.S. at 269, 273-75. Contrary to the City's position, the government is not held to endorse under the Establishment Clause whatever speech it permits on a nondiscriminatory basis. *Pinette*, 115 S.Ct. at 2449; *Lamb's Chapel*, 508 U.S. at 394-95; *Mergens*, 496 U.S. at 250; *Widmar*, 454 U.S. at 271-72. Indeed, because Establishment Clause analysis is necessarily fact dependent, this Court has rejected such "rigid, absolutist" calls for bans on all religious expression. *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984); and see *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (Establishment Clause analysis is necessarily fact dependent).

In any event, the City is obligated to comply with the requirements of the Establishment Clause whether it mimics the language in the Older Americans Act in its policy or not. But as discussed above, compliance would not permit the exclusion of all expression of religious perspectives by citizens on the premises of the Senior Centers. The Establishment Clause does not require such stridency and the Free Speech Clause does not permit it. *Rosenberger*, 115 S.Ct. 2510; *Lamb's Chapel*, 508 U.S. 384.

The City's suggestion that the phantom loss of federal funding justifies the total ban on religious speech is not supportable. First, there is nothing in the record to support the City's present contention that compliance with its constitutional obligations, as mandated by the Free Speech Clause and the court of appeals' decision, will result in the loss of federal funding to

which it is otherwise entitled. Second, the notion that the federal government will require the City to continue its unconstitutional policy and disobey the mandate of the court below, as a condition for the receipt of federal funds, is bizarre and constitutionally indefensible. The government cannot condition the receipt of a benefit upon the recipient's infringement of constitutionally protected rights.[4] Indeed, the City seems to argue that it must commit a constitutional wrong to receive federal funding. This turns the guarantees of the Constitution on their head.

The faux issue raised in the Petition -- if it actually exists at all -- is at best a potential dispute between the City and the federal government. In this case, it is no defense to a constitutional violation for one level of government to argue that another level of government may withhold funds from it unless it engages in a constitutional deprivation. The court of appeals correctly analyzed this point.

> The fact that the City's policy is designed to conform with federal statutory requirements, however, does not shelter it from constitutional scrutiny. A city or state's desire for

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[4]See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. ___, 116 S.Ct. 1495, 1513 (1996) ("Even though government is under no obligation to provide . . . a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right"); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech"); similarly see *FCC v. League of Women Voters of California*, 468 U.S. 364, 384-85 (1984); *Abercrombie v. City of Catoosa, Okla.*, 896 F.2d 1228, 1233 (10th Cir. 1990).

> federal funds is not a compelling government interest [that will] justify this viewpoint-based restriction on expression.

Pet. App. at 12a. Finally, whatever can be said of the Older Americas Act, the First Amendment trumps any statute allegedly requiring a city to engage in unconstitutional deprivations of free speech. See U.S. Const., Supremacy Clause, Art. VI cl. 2. See, e.g., *Widmar*, 454 U.S. at 276 (Court rejected the argument that government body may deny equal access in the name of an alleged compelling interest in following a state law mandate for "greater separation of church and state"); *Lamb's Chapel*, 508 U.S. at 386-87 (Court rejected the argument that it was required to adhere to New York's highest appellate court and the opinion of the Attorney General of New York).

II. THE DECISION BELOW COMPORTS WITH THIS COURT'S DECISION IN *TILTON V. RICHARDSON*, AND DOES NOT CONFLICT WITH THAT DECISION.

The City also erroneously argues that the court of appeals decision does not comport with this Court's decision in *Tilton v. Richardson*, 403 U.S. 672 (1971). Pet. at 10-11. The court below properly rejected the City's argument that its policy was justified under *Tilton*:

> *Tilton* . . . primarily concerned an Establishment Clause challenge to statutory language similar to that in the Older Americans Act. . . . In that case, the Court considered a federal grant and loan program for the construction of academic facilities at institutions of higher learning. The terms of the act excluded facilities used for sectarian instruction or religious worship. The Court held, however, that a provision in the act that effectively allowed facilities

> to be converted entirely to religious purposes after twenty years violated the Establishment Clause. [*Tilton*] at 682-84, 91 S.Ct. at 2097-99. *At no point did the Court address any free-speech challenge to the act, and nothing in the opinion implied that its decision upholding the remainder of the act against an Establishment Clause challenge could be extended to protect similar statutory language against a free-speech challenge.*

Pet. App. at 13a-14a (emphasis added). In *Widmar*, this Court considered a similar argument invoking *Tilton* and rejected it.

> [N]othing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others.

Widmar, 454 U.S. at 272 n.12. Thus, the City's argument under *Tilton* is entirely meritless.

III. THE CITY'S BAN ON ALL RELIGIOUS EXPRESSION AT THE SENIOR CENTERS IS VIOLATIVE OF THE FREE SPEECH CLAUSE AND IS NOT REQUIRED BY THE ESTABLISHMENT CLAUSE.

A. Free Speech Clause

The City erroneously argues that the total exclusion of religious expression, in the context of this case, is permissible under the Free Speech Clause and required by the Establishment Clause. Pet. at 20-25. This argument is meritless. Based on the abundant record evidence, the court of appeals held that the

Albuquerque Senior Centers are designated public forums. Pet. App. at 7a-8a. The court below stated, "[d]esignated public forums are those 'created by government designation of a place . . . for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects'." Pet. App. at 7a (quoting this Court's decision in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985)). The City opened a forum for use by speakers on the topics of religion, the Bible, and related topics. Pet. App. at 8a. Pastor Kimbro is within the class of persons eligible to make presentations at the Centers. Most significantly, the subject matter of the film that Pastor Kimbro desired to exhibit is within the topics and subject matter permitted for presentations at the Senior Centers. As the court below found, "[t]he film Jesus dealt with subject matter similar to that which would be included in a class on the Bible as literature." Pet. App. at 9a.

> The City excluded the film, however, because it
>
> > ran afoul of City policy . . . by advocating the adoption of the Christian faith. In contrast, a film about Jesus' life that ended on a skeptical note and urged agnosticism or atheism would not have contravened the City's policy.

Pet. App. at 9a. The court below correctly concluded that the "'prohibited perspective, not the subject matter' triggered the decision to ban the private expression." Pet. App. at 9a (citing *Rosenberger*, 115 S.Ct. at 2517).

The propriety of the decision below rests on the axiom that it is unconstitutional to exclude private speech from a designated public forum because of its viewpoint. *Rosenberger*, 115 S.Ct. at 2516; *Lamb's Chapel*, 508 U.S. at 392-94; *Perry*, 460 U.S. at 46. As the court below stated,

> [a]ny prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint. . . . [A] restriction prohibiting sectarian instruction intrinsically favors secularism at the expense of religion.

Pet. App. at 9a. With that consideration in mind, the court below correctly concluded that the "City's policy constitutes viewpoint discrimination." Pet. App. at 9a.

This Court in *Rosenberger* bluntly stated "that discriminating against religious speech was discriminating on the basis of viewpoint." 115 S.Ct. at 2518. Moreover, in *Lamb's Chapel*, this Court had no difficulty discerning the viewpoint discrimination embodied in a ban on presenting a religious film series discussing issues for the contemporary American family. 508 U.S. at 392-94. It is simply impossible for the City's policy to pass constitutional muster under *Rosenberger* and *Lamb's Chapel*. Here, as in *Lamb's Chapel*, the "subject matter [of the film] is not one that the [Senior Center] has placed off limits to any and all speakers." *Id.* at 393. As in *Lamb's Chapel*, the "application to exhibit the particular film . . . was [denied because] the presentation would have been from a religious perspective." *Id.* at 393-94. "[D]enial on that basis was plainly invalid." *Id.* at 394.

Even assuming, *arguendo*, that the Senior Centers are nonpublic forums -- as the City contends -- Kimbro must still prevail. In a nonpublic forum, the City's regulation of expression must still be viewpoint neutral. *Lamb's Chapel*, 508 U.S. at 392-93; *Cornelius*, 474 U.S. at 806; *Perry*, 460 U.S. at 46. Thus, assuming for purposes of discussion that the Senior Centers are nonpublic forums, the exclusion of the film because of its religious perspective constitutes unconstitutional viewpoint discrimination.

Id.; and see *Rosenberger*, 115 S.Ct. at 2516 ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction").

This Court has flatly rejected the City's suggestion that "proselytizing" is entitled to less than full constitutional protection. *Widmar*, 454 U.S. at 269 n.6; *Heffron v. ISKCON*, 452 U.S. 640 (1988). This Court has also rejected any attempt to carve out categories of religious expression for lesser degrees of First Amendment protection. *Widmar*, 454 U.S. at 269 n.6; and *Rosenberger*, 115 S.Ct. at 2524.

This Court has also rejected the City's argument that the policy is justified because the City bans all "sectarian proselytizing or worship," and has never allowed any religious perspectives on its premises. Pet. at 21. See *Rosenberger*, 115 S.Ct. at 2517 ("It is as objectionable to exclude a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint"); *Lamb's Chapel*, 508 U.S. at 393-94 (total ban on all religious expression constitutes viewpoint discrimination).

B. Establishment Clause

As the court below correctly observed, this Court "has made it abundantly clear that providing equal access to a designated public forum for citizens engaging in religious expression and citizens engaging in secular expression does not violate the Establishment Clause." Pet. App. at 11a (citing *Rosenberger*, 115 S.Ct. at 2520-25; *Lamb's Chapel*, 508 U.S. at 394-96; *Widmar*, 454 U.S. at 270-75). This constitutional axiom holds true even if the forum is characterized as nonpublic. *Lamb's Chapel*, 508 U.S. at 394-96.

The City's argument that the Establishment Clause is implicated because some persons might perceive that the City "sponsors" the "religious" perspective of the film is meritless. Pet. at 21. First, the City has never even suggested that it "sponsors" the viewpoint of all of the classes, lectures, and films that are presented at the facilities. Here, for the first and only time, the City makes this claim. Second, as this Court stated in *Lamb's Chapel*, where a facility has "repeatedly been used by a wide variety of private organizations[,]" there is "no realistic danger that the community could think that the [City] was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." 508 U.S. at 395; similarly see *Rosenberger*, 115 S.Ct. at 2523-24. The government cannot be held to "endorse everything [it] fail[s] to censor." *Mergens*, 496 U.S. at 250; similarly see *Rosenberger*, 115 S.Ct. at 2522. Third, in *Pinette*, 115 S.Ct. at 2446-50, this Court rejected an argument substantially similar to that raised by the City. This Court observed that allowing equal access may result in some persons misperceiving the access as preferential treatment. This does not, however, create an Establishment Clause violation. "Private religious speech cannot be subject to veto by those who see favoritism where there is none." *Id.* at 2449. The City may cure whatever misperception it fears may result from discontinuing its practice of viewpoint discrimination against religion by publishing a disclaimer along with the announcements of events. See, e.g., *Pinette*, 115 S.Ct. at 2450; *Mergens*, 496 U.S. at 251; *Widmar*, 454 U.S. at 274.

The City also cites *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) in support of its Establishment Clause argument. Pet. at 20. The same *Allegheny* argument was raised and rejected in *Pinette*. Unlike the Senior Centers, the staircase in *Allegheny* did not involve a forum where expression routinely occurred. *Allegheny*, 492 U.S. at 600 n.5.

Most significantly, "if the staircase were available to all on the same terms, 'the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche'." *Pinette*, 115 S.Ct. at 2447 (quoting *Allegheny*, 492 U.S. at 599-600). At bottom, *Allegheny* "neither holds nor even remotely assumes that the government's neutral treatment of private religious expression can be unconstitutional." *Id.*

CONCLUSION

The petition for writ of certiorari should be denied.

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No. 96-286

In The

Supreme Court of the United States

October Term, 1995

CITY OF ALBUQUERQUE, and TONI MARTORELLI, in her official capacity as Director of Family and Community Services for the City of Albuquerque, and MARK SANCHEZ, in his official capacity as Deputy Director of Family and Community Services for the City of Albuquerque, and KATHLEEN STARK, in her official capacity as Supervisor, Bear Canyon Senior Center, City of Albuquerque,

Petitioners,

versus

CHURCH ON THE ROCK and PASTOR DON KIMBRO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The respondents in their opposing brief in No. 96-286 argue two points that require response: that the enforceability of the Older Americans Act was not raised nor preserved below, and the respondents' recitation of the facts.

ARGUMENT

I.

THE ENFORCEABILITY OF THE OLDER AMERICANS ACT WAS RAISED AND DECIDED BELOW.

The issue of the enforceability of the Older Americans Act was expressly determined by the United States Court of Appeals for the Tenth Circuit. The issue was thoroughly argued and reargued by petitioners throughout the proceedings before the district court and the court of appeals. The respondents have consistently ignored the entire issue, instead staking their claim on the Free Speech Clause. It is simply too late in the game for the respondents to now attempt to assert that the statutory issue does not exist.

The constitutionality and enforceability of the funding condition in the Older Americans Act was *both* pressed by the petitioners below *and* passed upon by the court of appeals. As a matter of constitutional law, and central to its holding, the court of appeals held that the City's enforcement of the Older Americans Act "does not shelter [the City policy] from constitutional scrutiny" and that such enforcement was not a compelling governmental interest. Pet. App. 12a. The court of appeals has declared that enforcement of the Act is unconstitutional, in clear conflict with this Court's view in *Tilton v. Richardson*, 403 U.S. 672 (1971).

In their brief before the court of appeals, the petitioners emphasized and reemphasized that the City's policy was designed to enforce federal law, and that the federal law was coextensive with the Establishment Clause. In declaring the Act unconstitutional, the court of appeals has now challenged the power of Congress to implement the Establishment Clause, thus giving rise to the question presented for review.

Following are extensive excerpts from the petitioners' brief before the court of appeals, which illustrate the fact that petitioners thoroughly presented the statutory issue before that court:

RESPONSE TO THE APPELLANTS' STATEMENT OF ISSUES PRESENTED FOR REVIEW

The trial court announced its decision simply and succinctly in two parts. First, the court held that the City of Albuquerque's policy against "sectarian instruction" and "religious worship" was permissible regardless of the nature – public or nonpublic – of the forum. The court premised its holding on the Older Americans Act, which defines the purposes of senior centers; the court found that the statutory purposes did not include the type of speech being proposed by appellants. (Aplee. Br. p. 1.)

* * *

STATEMENT OF THE CASE AND RELEVANT FACTS

The City of Albuquerque ("City") maintains a policy disallowing "sectarian instruction" and "religious worship" at its senior centers. This policy was enacted pursuant to the Older Americans Act ("Act"), which requires as a condition of federal grants that senior centers not be used for such purposes. 42 U.S.C.A. § 3027(a)(14)(A)(iv). Aplt. App. at 119. (A copy of § 3027(a)(14)(A)(iv) is attached hereto as Exhibit "A".)

City senior centers receive funding under the Act from the federal government, channeled through the New Mexico State Agency on Aging. The money is used, among other purposes, to renovate senior centers. Aplee. Supp. App. at 6; Aplt.

App. at 936.1 and 937. The Act establishes the basis for the City's policy.

(Impact on listeners of the appellants' speech is not the basis for the City policy; the basis is § 3027. . . .) (Aplee. Br. p. 3.)

* * *

The Act further defines the purposes of senior centers. 42 U.S.C.A. § 3002(35). (A copy of § 3002(35) is attached hereto as Exhibit "B".) (Aplee. Br. p. 3.)

* * *

In line with the purposes established by federal law, the City restricts use of its senior centers by excluding – in addition to "sectarian instruction" and "religious worship": groups that are not composed of at least 75 percent seniors; for-profit businesses; political campaigners; solicitation, and groups whose purpose are not for the study of or discussion of senior citizen issues. Aplt. App. at 119-121; 910-917. (Aplee. Br. p. 4.)

* * *

Moreover, the appellants conveniently neglect to tell the Court that Mr. Perdue qualified his answers in most, if not every instance, by testifying that the appellants' hypothetical examples would only be allowed if they were permitted under federal law (42 U.S.C.A. § 3027) as not being sectarian instruction or religious worship. See, e.g., Aplt. App. at 837, L.10-13 and 839, L.13-16. (Aplee. Br. p. 7.)

* * *

ARGUMENT

I. SUMMARY AND INTRODUCTION. (Aplee. Br. p. 10.)

* * *

Appellants' Brief is silent on two key issues: application of 42 U.S.C.A. § 3027, and of the defense of the Establishment Clause.

Appellants offer no rebuttal or legal authority to the effect that § 3027 does not apply, except to meekly state that the statute is preempted by the First Amendment. Appellants fail to respond, as they did in the district court, to arguments that the religious prohibitions of § 3027 implement the Establishment Clause and that the very language of these types of federal grant statutes have been held constitutional. (Aplee. Br. p. 11.)

* * *

II. THE DISTRICT COURT CORRECTLY HELD THAT THE CITY PROPERLY EXCLUDED APPELLANTS' SPEECH BECAUSE IT WAS NOT WITHIN THE INTENDED PURPOSES OF THE SENIOR CENTERS. (Aplee. Br. p. 14.)

* * *

A. The Statutory Background for the City Policy.

Title III, Section 307(a)(14)(iv), of the Older Americans Act (42 U.S.C.A. Section 3207(a)(14)(iv)) provides that agencies that receive federal money for senior centers must assure the federal government that a senior center "will not be used and is not intended to be used for sectarian instruction or as a place for religious worship." The City policy at issue in this case is a verbatim reflection of this statute, and was drafted pursuant to its

commands. Aplt. App. at 119, 3. Title III funds are received by the City for use in senior center renovation and other uses. Aplee. Supp. App. at 6; Aplt. App. at 936.1 and 937.

This statute is echoed in regulations of the United States Office of Management and Budget governing Grants for State and Community Programs on Aging. The regulations flatly provide: "Senior centers may not be used for sectarian instruction or religious worship." 50 Fed. Reg. 1650, § III(A). (A copy of this regulation is attached hereto as Exhibit "C".)

The language of the City policy, and of its parent federal statute, is a standard requirement of a wide variety of federal grant statutes. See, e.g., 20 U.S.C.A. § 1021; 20 U.S.C.A. § 1213d; 20 U.S.C.A. § 2397c; 25 U.S.C.A. § 1803; 29 U.S.C.A. § 1577; 42 U.S.C.A. § 2753; 42 U.S.C.A. § 5001.

In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court upheld the general constitutionality of this type of regulation. At issue was the Higher Education Facilities Act of 1963, which authorized grants for expansion of college facilities, but prohibited monies for "any facility used or to be used for sectarian instruction or as a place for religious worship. . . . " In fact, the only part of the statute that the Court found unconstitutional was a 20-year restriction on the exclusion of sectarian uses. The Court struck down that restriction because it was "inadequate to ensure that the impact of the federal aid will not advance religion." 403 U.S. at 682.

Similarly, in *Fordham University v. Brown*, 856 F. Supp. 684 (D.D.C. 1994), the Court held that the federal government, in attempting to comply with the First Amendment, legally promulgated regulations barring use of federally funded broadcast equipment for essentially sectarian purposes. The Court quoted the government's position, which can be said to represent the City's defense in the case at

bar, as follows: "We have a responsibility to see that this [grant] program is not turned to narrow private purposes in contravention of the letter and intention of the Act, a responsibility which assumes Constitutional dimensions where use of facilities for sectarian purposes would violate the Establishment Clause of the First Amendment." 856 F. Supp. at 691. See also *Roemer v. Board of Public Works*, 426 U.S. 736 (1976).

Thus, the City policy is identical to a constitutional federal statute in language and intent, and is designed to ensure compliance with that law. The appellants argue, nevertheless, that the Free Speech Clause "trumps" the statutory restrictions of § 3027. However, this argument ignores the fact that § 3027 implements the Establishment Clause, which is in itself a compelling government interest justifying restrictions on speech.

As stated in *Fordham University, supra*, 856 F. Supp. at 691 in interpreting a similar statute: "Applicants with religious affiliations will be expected to show that both the applicant organization and its proposed services will be nonsectarian in nature. By 'nonsectarian' we mean that they do not have the function or purpose of advancing or propagating a religious belief. (citing *Tilton* and its companion case, *Lemon v. Kurtzman*, 403 U.S. 602 (1971))." A violation of the Establishment Clause is a compelling state interest justifying abridgement of the rights of free speech. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981); *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517, 522 (9th Cir. 1994); *Doe v. Small*, 934 F.2d 743, 759 (7th Cir. 1991) ("A government may not evade the constitutional obligations imposed by the Establishment Clause by seeking refuge in the protective mantle afforded to private actors by the freedom of speech and expression clause of the First Amendment"). (Aplee. Br. pp. 14-17.)

* * *

B. The District Court Properly Found the Appellants' Speech to be Within the Prohibition of Section 3027 and the City Policy as "Sectarian Instruction" or "Religious Worship". (Aplee. Br. p. 17.)

* * *

The City's position is that "sectarian instruction" and "religious worship" under § 3027 is coextensive with the Supreme Court's identification of conduct that violates the Establishment Clause. As stated in *Fordham University, supra*: By "nonsectarian" we mean that they do not have the function or purpose of advancing or propagating a religious belief." 856 F. Supp. at 691. (Aplee. Br. p. 18.)

* * *

C. The District Court Correctly Concluded That Appellants' Speech Was Not Within the Purposes of Senior Centers and Could Be Properly Excluded.

The Older Americans Act defines senior centers as essentially places where "a broad spectrum of *services*" (emphasis added) are available to senior citizens. 42 U.S.C.A. Section 3002(35). Aplt. App. at 910. See *Calash v. City of Bridgeport*, 788 F.2d 80, 83 (2nd Cir. 1986) (property dedicated as a "service facility" held nonpublic). Senior centers are not defined as forums for expression, let alone religious proselytizing. In fact, the federal government has specifically forbidden this type of speech in senior centers. 42 U.S.C.A. Section 3027. (Aplee. Br. p. 21.)

* * *

III. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE CITY'S POLICY WAS VIEWPOINT NEUTRAL.

(Aplee. Br. p. 37.)

* * *

> The appellants do not dispute that sectarian instruction and religious worship are forbidden in senior centers by 42 U.S.C.A. § 3027 and City's policy that implements that statute. The "purpose" of senior centers is not to provide a forum for sectarian proselytizing. Federal law defines senior centers as "a community facility for the organization and provision of a broad spectrum of services, which shall include provision of health (including mental health), social, nutritional, and educational services and the provision of facilities for recreational activities for older individuals." 42 U.S.C.A. § 3002(35).

In the proceedings below, the issue of the validity of § 3027 as a Congressional expression of the limits of the Establishment Clause was at the heart of the petitioners' defense. The petitioners clearly pressed the issue of the enforceability of § 3027 and the court of appeals clearly held that § 3027 unconstitutional as a justification for the City's actions. Thus, this Court can, and should grant certiorari on the issue presented for review. *United States v. Williams*, 504 U.S. 36, 41 (1992).

II.

THE RESPONDENTS MISSTATED THE FACTS

Respondents take great liberties with the facts in the record below and their misstatements of fact must be corrected in order for the Court to properly review the Petition for Certiorari. Essentially, respondents mold the facts into a form that creates the result they desire with no connection to the facts actually in the record. Respondents state that any expression is allowed at the facilities as long as it is of

interest to seniors. Brief in Opp., pp. 1-2. This misrepresentation of senior centers creates the image of a public forum with no regulation of speech. However, Congress has chosen to extensively regulate the creation and administration of the programs at City senior centers. (See Pet., pp. 20-24.) It is this legislative framework that delineates the purposes of senior centers, defines the requirements for senior center programs and results in the pervasive sponsorship by the City of programs at those centers.

All of the classes reviewed by respondents at pages 6-9 of their Brief in Opposition occur as part of a City-sponsored program mandated and regulated by the Older Americans Act. Pet. at 8 and 21-22.[1]

Neither *Rosenberger* nor *Lambs' Chapel* require that federally funded senior centers allow a Pastor of Discipleship to proselytize to participants in their government-sponsored curriculum. (The respondents offer not one factual iota to rebut the petitioner's point that respondents sought access to this very program as an "outside" religious organization, and did not seek use of the facilities after-hours.)

The importance and substantiality of the question presented has not been denied by the respondents. Their claim that the issue was not raised nor preserved below is rebutted by the record and by the opinion of court of appeals itself. In light of the respondent's inability to face the issue presented,

---

[1] On pages 6 through 8 of their Brief in Opposition respondents misstate the facts in regard to two of the classes. On page 7, the Class on *New Testament Bible Study* was cancelled because of its possible violation of City policy as sectarian instruction. Aplt. App. at 1474. The *Passover Commemoration* was not an activity even held at a Senior Center, it was an in-town senior trip held at another location. Aplt. App. at 688. In fact, the program was not a religious service but a musical performance of a Handel Oratorio, *Israel in Egypt*. None of the classes held at the senior centers contained religious worship or sectarian instruction.

the need for plenary review of the action below is indisputable.

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